SUPREME COURT, U. S.
No. 74-1170
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MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

THOMAS MARTIN AUSTIN, KENNETH PAUL ALBANESE, JAMES THOMAS BEZOUSEK, JAMES RALPH BLUMER, ARTHUR MARC CAMPUS, THOMAS JOHN COLLURA, ALAN STEPHEN DORN, MICHAEL DAVID FRAZIER, BARRY LAWRENCE FRIEDMAN, MAURICE A. HENRY, ALVIN MARRIS HIGGS, DAVID ARTHUR LIDOV, EDWARD JAMES LUERSSEN, ALBERT ANTONIO MARTINEZ, LESTER PATRICK NOLAN, PAUL PARKER, ROBERT RICHARD PEREZ, MICHAEL DAVID POWERS, MICHAEL ROSENBAUM, SIDNEY E. SALZMANN, CHARLES FENN SLEETH, and RONALD EDWARD TERRITO, Real Parties in Interest,

Petitioners,

—v.—

UNITED STATES OF AMERICA and HON. JACK B. WEINSTEIN, District Judge.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The undersigned attorney, on behalf of the above-named real parties in interest, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) is not yet reported. The district court's opinion of September 30, 1974 (App. C), is reported at 382 F. Supp. 1111. The other opinions of the district court (Apps. B, D, and E, infra) are not yet reported.

JURISDICTION

On January 30, 1975, the Court of Appeals granted the government's petition for a writ of mandamus and prohibition, (1) requiring the district judge to vacate his orders opening the Selective Service files of each of the petitioners for inspection by their court-appointed attorney and an amicus curiae, and (2) forbidding the district judge to entertain motions on behalf of any of the petitioners(non-appearing defendants charged with draft violations) raising "non-jurisdictional" defenses to the indictments against them, unless the respective defendant had personally authorized the making of such a motion on his behalf. The judgment of the court of appeals is set forth in App. F infra. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is the judiciary powerless to inquire (without the United States Attorney's consent) into the validity of the more than four thousand pending draft violation indictments of persons who have not submitted to prosecution, so that the executive branch retains a jurisdictional monopoly over the treatment of such persons?

2. Does a district court have power to inquire into the validity of the indictment of a non-appearing defendant who has not retained counsel or personally requested appointment of counsel?

3. Does a district court have power to appoint counsel for such a defendant in order to permit adjudication, in an adversary context, of questions whether the indictment is invalid because (a) it has been unconstitutionally used as an instrument of exile, and/or (b) it is predicated upon alleged failure to comply with an unauthorized and therefore unlawful draft board order?

4. Does a district court have power to direct the government to open the Selective Service file of such a defendant without personal authorization by him, for inspection by an attorney appointed to represent him in testing the validity of his indictment?

5. Does a court of appeals have power to adjudicate the government's

petition for interlocutory review of district court orders which, whether or not erroneous, can only affect the government's legitimate interests if they lead to dismissal of an indictment (from which dismissal the government can appeal)?

6. Has the controversy been rendered partly moot by the recent amendments to the Freedom of Information Act, which became effective after entry of the court of appeals judgment?

STATEMENT

On September 10, 1974, the respondent Jack B. Weinstein, United States District Judge for the Eastern District of New York, on his own motion appointed Louis Lusky (a member of the bar and a professor at Columbia Law School) to represent, as their attorney, the defendants in all of the draft violation cases on his calendar in which the defendants had not appeared. There were 26 such cases. Of the 26 defendants, only 22 are involved as real parties in interest in the present case; the indictments against three of the other four defendants (Howard G. Lockwood, Donald Charles Dewey, and Franklin Wilson) were dismissed for various reasons on the government's motion, and in the fourth case (United States v. Estremera) the defendant's attorney in an unrelated case has been substituted for Louis Lusky as attorney for Mr. Estremera in the draft violation case as well and that defendant(having personally authorized such substitution) is unaffected by the court of appeals decision herein.

Also on September 10, 1974, Judge Weinstein rendered a memorandum opinion (App. B) saying briefly why he considered appointment of counsel to be appropriate:

> The court takes judicial notice of the fact that the President and Congress are considering some form of amnesty that may affect the rights of these defendants and thousands of others who are similarly situated.

It will be helpful to recall the context. Two days before, on September 8, President Ford had pardoned his immediate predecessor of any and all crimes he may have committed during his presidency. The seeming inconsistency between that pardon and the continued prosecution or punishment of war resisters (as well as other aspects of the pardon) had sparked large public discussion. It was, in fact, on September 16 -- six days after the September 10 appointment of counsel -- that President Ford, by executive order (Ex. 2 for identification in the proceedings below), instituted his conditional amnesty program under which alleged draft violators could obtain dismissal of their indictments by performance of prescribed civilian service for a period of not more than two years.

Against that factual background, the United States Attorney moved to vacate

the September 10 appointment of counsel, and a hearing was had on September 20. The motion was denied. In order to expedite such appellate review as the government might wish to seek, Judge Weinstein -- without expressing any opinion as to the availability of interlocutory appellate review -- hastened to issue a memorandum opinion that same day, explaining in greater detail the reasons for appointment of counsel. At the hearing he had told counsel why he intended to render an opinion that same afternoon, and had said it would be subject to revision (9/20/74 Tr. p. 64). He did revise it promptly thereafter, rendering the revised opinion (App. C) on September 30.

In that opinion Judge Weinstein stated at greater length his reasons for the appointment of counsel (App. C, pp. 2-4). After reviewing the government's conditional amnesty program, he commented upon it (id. at 3-4):

> In effect, a pretrial diversion or deferred prosecution scheme is to be applied in these cases. * * * It is sometimes called the "Brooklyn Plan," for one form was developed in this court. Before or after indictment, but without trial or plea, the defendant is placed under supervision. If he responds favorably over a fixed period of time -- usually one or two

years -- he is not indicted or, if he had been indicted, the indictment was dismissed.

The saving in time and money and the enhancement of the likelihood of rehabilitation make diversion programs attractive. But they present grave dangers unless they are strictly controlled. A guiltless person may be forced to undergo strict supervision and loss of liberty because he wants to avoid the expense and embarrassment of contesting the government's case. * * *

Some method must be utilized to prevent abuse of plans which divert cases from the normal criminal machinery to ensure that individual rights are being safeguarded. The agency with primary responsibility to prevent prosecutorial abuse after indictment is the court.

While an indictment against a defendant remains outstanding, the pressure on him to agree to perform "alternate service" is great even though the indictment may be invalid and there is no warrant in law for his being denominated a draft evader. * * *

Both from the point of view of effective calendar control and protection of the rights of those accused of

> draft evasion, it is desirable to screen these selective service cases to determine if they have any merit.

The government elected not to seek appellate review at that time, and further proceedings were had in the district court. Defense counsel's motion to dismiss on constitutional grounds (briefly summarized below) was argued on November 1. After hearing argument, Judge Weinstein reserved judgment on the motion pending receipt of a brief from the government. He also stated on the record that the government should make the Selective Service files available for examination by defense counsel, but stayed the informal order pending receipt of the government's brief.

On November 21, 1974, having received and considered that brief, Judge Weinstein vacated the stay and entered an order making it possible for the government to provide copies of the Selective Service files without cost to the United States Attorney's office (that official having objected to the imposition of such expense). In his memorandum and order (App. D, pp. 1-2) Judge Weinstein said:

> Rather than further embarrass the United States on this matter, the court directs that the files be made available by delivering them, or a copy, to this court in chambers within five days. This court will then have its own personnel produce a copy for counsel for the defendants and one for the amicus curiae. Counsel for the

> defendants and the amicus curiae will hold the copies for the defendants.

The amicus curiae was Michael E. Tigar, Esq., of the Washington, D.C. law firm of Williams, Connolly & Califano, who (by reason of interest arising from his representation of defendants in other pending draft violation cases) had been permitted to file briefs and participate in oral argument at the September 20 and November 1 hearings.

On November 26, 1974, Judge Weinstein denied the motion to dismiss, without prejudice to its renewal after defense counsel had examined the Selective Service files of the several defendants. In his memorandum opinion (App. E) he gave several reasons for this course, saying among other things (id., p.13):

> [W]hen an important constitutional issue is raised which may require Appellate and Supreme Court adjudications, it is particularly appropriate to develop individual records for the benefit of the reviewing court.

The government then stated its intention to seek appellate review, and Judge Weinstein granted a stay to permit preparation of the necessary papers. In due course the government petitioned the Second Circuit Court of Appeals for mandamus and prohibition. Argument was heard on

January 6, 1975. On January 30, 1975, the court of appeals rendered its opinion (App. A) and entered its judgment (App. F) granting the relief described above under the heading "Jurisdiction."

Judge Weinstein notified the court of appeals on December 10, 1975, that he had no intention of filing an answer or appearing, and he took no part in the court of appeals proceeding. On the assumption that he will adhere to that neutral posture, he is here named as a party respondent. The petitioners herein are the defendants in the several district court cases affected by the decision of the court of appeals, who as real parties in interest were parties to the court of appeals proceeding (Fed. Rules App. Proc. 21(b)), and under this Court's Rule 21(4) have standing to petition for certiorari. As required by the said Rule 21(4), the undersigned counsel for petitioners (a) has notified the Clerk of this Court that (for the reason stated above) Raul Estremera has no interest in the outcome of the present petition, and (b) has served a copy of that notice on all parties to the proceeding below including the said Raul Estremera.

REASONS FOR GRANTING THE WRIT

I. Not only does this case involve an important question of federal law which has not been, but should be, settled by this Court. It also presents a controversy as to whether at least one other such question, of the very first magnitude, can be forever withheld from adjudication here.

The backdrop for the present litigation is the war in southeast Asia, which has been the

longest in our history and the most divisive since the Civil War. Many of our most public-spirited, selfless, and intelligent young citizens, deeply doubtful that this military venture (the necessity of which has never been made clear to the American people by any administration, Democrat or Republican) was a just war, were reluctant to participate in it. Some of them sought and were granted exemption from military conscription as conscientious objectors. Some were denied such exemptions -- erroneously, in a number of cases, as this Court has since held (see, e.g., Welsh v. United States, 398 U.S. 333 (1970)) -- but nevertheless submitted to induction into the armed services. Others did not respond to induction orders and were accordingly indicted for violation of the Selective Service Law and regulations. Of these, some submitted to prosecution; but more than four thousand did not. (According to official statistics, the count as of August 31, 1974, was 4,177, consisting of 4,146 indictments and 31 informations.) It is this last group that the present case concerns. The 22 petitioners were indicted in the Eastern District of New York during the period 1968-1973, and have not surrendered or been arrested. So far as is known, all of them are in foreign countries.

The court of appeals, in its opinion, repeatedly referred to them as "fugitives" (see, e.g., App. A, pp. 8, 9, 10, 11, 12, 13), and it declared that prosecution had been frustrated by their "flight from the jurisdiction." (id., p. 12). The record contains no basis for characterizing them as fugitives; indeed, as the court of appeals was informed, there is good reason to believe that at least some of them did not leave this country to avoid prosecution:

At the oral argument, defense counsel emphasized that the effect of granting the government's petition would be to prevent the district court from ascertaining whether they were fugitives or not; and, to illustrate the point, he made avowal that the defendant Richard E. Salzmann had no reason to anticipate being drafted because he had a deferment as a rabbinical student, with the sure prospect of receiving a ministerial exemption upon graduation, and for religious reasons had gone to Israel a month before graduation without realizing that this would precipitate an induction order. He later served in the Israeli army. He cannot rightly be called a fugitive, nor can it rightly be said that his prosecution has been frustrated by his "flight from the jurisdiction." The same is true of at least some of the other defendants, such as Thomas J. Collura who went to Italy in 1965 to finish his education, including a doctorate in chemical engineering, and did not return in 1971 when he was ordered to report for induction, or in 1972 when he was indicted. The fact is that the court of appeals, by prohibiting the district court from opening the Selective Service files for examination, has foreclosed resort to the most direct means of finding out which of the defendants, if any, actually <u>is</u> a "fugitive" who has frustrated prosecution by "flight from the jurisdiction."

In questioning the terminology employed by the court of appeals, we do not intend to suggest that

the defendants necessarily have a defense to the charges against them. That is a separate question. We do say that that separate question can be approached most dispassionately and evenhandedly if the defendants' names are not first blackened gratuitously by opprobrious epithets.

The precise question now before this Court is whether a court of appeals can rightly prevent a district court from inquiring sua sponte into the validity of draft violation indictments which, though fair on their face, may be subject to dismissal on motion. That question should have been decided (a) in the light of judicially noticeable facts concerning draft violation prosecutions, and (b) in the light of the substantiality of the objections to which the indictments may be vulnerable. Instead, the court of appeals ignored both; it adopted a flat, self-blinding rule that -- except with the United States Attorney's consent -- the district court can dismiss invalid indictments only on motion of an attorney whom the defendant has personally authorized to seek dismissal. We now discuss briefly the two above considerations, which the district court took into account but which the court of appeals, in effect, held immaterial.

Facts concerning draft violation prosecutions: Two simple and judicially noticeable facts are sufficient to disclose a possibility of injustice worthy of judicial concern:

(1) On September 16, 1974, President Ford by proclamation instituted a conditional amnesty

program under which alleged draft violators could have their indictments dismissed if they surrendered to the United States Attorney and performed civilian service approved by the government for a period of not more than two years. As Judge Weinstein observed, such a program gives rise to the danger that a guiltless defendant(for example, one whose induction order was invalid under the rule of Gutknecht v. United States, 396 U.S. 295 (1970) or the rule of Welsh v. United States, 398 U.S. 333 (1970) and whose indictment was therefore dismissible) might be constrained to accept the burden of alternative service because of his fear of the vicissitudes of a jury trial.

(2) The indictments in these cases are by no means "mere statistics" as the court of appeals declared them to be (App. A, p. 12). We submit that the district judge was plainly right in the position he took on precisely this point at the hearing of September 20, 1974. In response to the assertion of the Assistant United States Attorney that a dormant indictment "is basically, simply a statistic", Judge Weinstein responded (9/20/74 Tr. pp. 11-12):

> No, it is not simply a statistic. On that I disagree with you and I think that is fundamental to an understanding of these things. These are not statistics. They involve real people and they involve the protection of the public and under the individual calendar system in this court, the Court, as I understand it, has the obligation to make sure these cases are not forgotten.

> There have been cases in the past, fugitive cases, that I have called where it appeared to me that the assistant in charge of the case had forgotten the case and as I recall, in one instance, the defendant fugitive was actually incarcerated.
>
> Now, these are not statistics. These are real cases * * *.

Later in the same hearing, defense counsel developed Judge Weinstein's line of thought further (id., p. 27):

> Some of the Selective Service violators have felt that their consciences and their country could best be served by standing trial* and taking the legal consequences of their actions. Others have thought that they could serve their consciences and their country better by avoiding prosecution and in order to do that they have either had to leave the country or go underground and hide in this country. I say that the pendency of these indictments on this Court's record is a fact which is tantamount to an order of exile for defendants in the latter class [,] and this has nothing to do with whether the indictments are legal or not. It is

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* As originally rendered, the transcript read "standing proud". This stenographic error was later corrected by stipulation.

just a question of whether they are simply statistics as Mr. Korman said, or whether they are real, live [,] operative legal instruments.

Substantiality of objections to the indictments: The objections that we shall address to the indictments, unless prevented by the judgment of the court of appeals, fall into two categories. The first is abuse of criminal process. The second is possible invalidity of draft board orders which the defendants are accused of disobeying. The nature of the latter type of objection is self-evident, as is the fact that such objections cannot be framed without access to the Selective Service files. The nature of the former objection, however, requires a brief explanation.

It is familiar doctrine that criminal process is not to be used for purposes collateral to the prosecution and lawful punishment of crime. For example, it is not to be used to coerce payment of a debt, or to obtain the secret discovery of facts for use in civil litigation. See, e.g., Procter & Gamble v. United States, 356 U.S. 677, 683 (1958). We contended in the district court that the present indictments have been so abused, in that they have been employed as instruments of exile; and that court, while conceding that the point (not yet passed upon by this Court) may have merit (App. E, pp. 8-12) denied a motion to dismiss, with leave to renew the motion after a more complete factual record, which Judge Weinstein said would be more suitable for appellate review, had been made on the basis

of the Selective Service files (id., p. 13). The court of appeals, however, shrugged off the objection as frivolous (App. A, p. 8).

The objection is far from frivolous. To show that it merits the careful attention of the lower federal courts, and ultimately of this Court, we shall sketch it out. If the Court so desires, we shall be glad to brief it fully; but inasmuch as we do not think the Court will consider the question of abuse of criminal process to be ripe for decision until the lower courts have deliberated upon it, we state only enough to rebut any suggestion of frivolity.

In this connection, this Court should be advised that the summary rejection of the speedy trial contention by the court of appeals cannot be assumed to reflect full deliberation on its part. In our brief in that court we said, as we have said here, that we did not purport to brief the point fully but would go into it only far enough to show that it raises a non-frivolous question of first impression. We added, however (Response to Petition, p. 21):

> To any member of this Court who desires full explication of the factual and legal basis of our speedy trial claim, we shall be prepared at the oral argument to hand up copies of our two briefs supporting the motion to dismiss.

The briefs were tendered at the oral argument as promised, but no member of the panel asked for them, and none were filed. The point was hardly touched on in the oral argument itself.

Under these circumstances it is not to be supposed that the court of appeals has fully informed itself on the question and extended to it the deliberate consideration which it customarily accords.

A simple way to sketch the point is to hypothesize a case: If the President were to announce publicly (a) that persons indicted for draft violation could elect between surrendering for trial and leaving the country forever, and (b) that in the latter event no effort would be made to procure their return for trial, we submit that this Court would condemn such a program of exile as an abuse of criminal process. At least two lines of constitutional doctrine converge to forbid it: (1) Exile for draft evasion is a penalty not authorized by law, and constitutes a cruel and unusual punishment in violation of the Eighth Amendment under the principle established in Trop v. Dulles, 356 U.S. 86 (1958) as well as punishment without the safeguards of the Fifth and Sixth Amendments in violation of the principle established in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). (2) The Speedy Trial Clause of the Sixth Amendment imposes an obligation on the government to do what it can to procure the return for trial of defendants who, even though they are beyond its territorial jurisdiction so that it has no legal right to their return, may in fact be sent back by another state pursuant to a request based on comity. This Court so held in Smith v. Hooey, 393 U.S. 374 (1969) and Dickey v. Florida, 398 U.S. 30 (1970). Moreover, this Court has also held that although a defendant's lack of desire for a speedy trial is a factor militating against his claim of the Sixth Amendment right, it is not conclusive because "there is a societal interest in providing a speedy

trial which exists separate from and at times in opposition to the interests of the accused." Barker v. Wingo, 407 U.S. 514, 519(1972). The important question as to how the speedy trial rule of that case, which requires the balancing of four separate factors, is to be applied in the context of draft violation prosecutions, has not been settled by this Court but eventually should be. For a reason to be stated in a moment, the decision of the Court of Appeals, if allowed to stand, will very probably preclude such a determination.

First, however, it is to be observed that the executive branch of the government has in fact pursued a policy of giving alleged draft violators a free choice between trial and exile for life, and of making no attempt to procure their return from abroad. So far as we have been able to ascertain, it has never in the last half-century requested a foreign government, on the basis of comity, to extradite, deport, or exclude such a defendant from its territory. See Gosfield, American War Resisters, 5 N.Y.U. J. Int'l L. & Pol. 503, 522 (1972). On occasion it explains this omission on the ground that national policy forbids such a request except pursuant to an extradition treaty applicable to the offense, which our present extradition treaties are not. See Evans, Acquisition of Custody over the International Fugitive Offender -- Alternatives to Extradition: A Survey of United States Practice, in The British Year Book of International Law (1964), p. 77, at p. 79. It is known, however, that this supposed policy is not adhered to in the ordinary run of criminal cases, such as narcotics cases. The Second Circuit Court of Appeals knows it well, having recently adjudicated just such a case. Fiocconi v. Attorney General of the United States, 462 F. 2d 475 (2d Cir. 1972). When in pursuit of common

criminals, the executive branch avails itself of all the resources available to it by the comity of nations to procure their return for trial. As for defendants charged with offenses thought (however wrongly) to reflect lack of allegiance, it is content with exile and does not pursue them. That is the same policy which this Court held in Trop v. Dulles and Kennedy v. Mendoza-Martinez, supra, to be unconstitutional. And though the policy has not been formally promulgated, the executive branch has allowed it to become generally known and understood.

As stated above, we do not ask this Court now to decide the question whether there has been an abuse of criminal process that should lead to dismissal of these indictments and more than four thousand others. The Court is entitled to the benefit of preliminary consideration of the question by lower federal courts. Our points are, rather, (1) that the question is of first-magnitude importance, not only because it involves the future of a great many young Americans whom this country needs, but also because it presents the opportunity to clear from the dockets of the federal courts more than four thousand indictments that have gone stale, in the sense that no such indictments would be returned today; (2) that the question is a substantial one, left open by this Court's prior rulings and not to be shrugged off as frivolous, because it rests on a claim of fault on the government's part that is anterior to and more fundamental than any fault of the defendants in absenting themselves; and (3) that the court of appeals decision, unless reversed, may well prevent it from ever being adjudicated here.

In connection with this third point, a word of explanation is appropriate. It is true that

the court of appeals has (somewhat inconsistently) permitted the district court to entertain motions to dismiss on behalf of defendants who, though still in exile, personally authorize such action by their court-appointed attorney. Four of the 22 petitioners, having learned of the present proceeding, have mailed in such personal authorizations, and a few more may do so. So far as can be known, however, most of them have not received the notices of appointment of counsel which the United States Attorney, at Judge Weinstein's direction, mailed to them at their last-known addresses; at any rate, nothing has been heard from them. Motions to dismiss will of course be made on behalf of the four who have sent personal authorizations (after the government produces their Selective Service files for inspection, which it has not yet done though requested); but these few cases may well go off on non-constitutional grounds such as departure from the Gutknecht and Welsh rules by the draft boards, in which event the constitutional questions will presumably not be reached. Moreover, in any case where this does not occur, it is within the power of the government to move dismissal of that particular case voluntarily (as it has already done in three of the original 26 cases, including the two oldest ones -- one of them dating from the Korean War -- after the speedy trial claim was made), and this is a move which defense counsel cannot rightly resist without the unlikely consent of his client.

* * * * *

The foregoing explanation of the dynamics of this litigation is necessarily somewhat sketchy. If the Court permits, a fuller picture will be drawn in our brief on the merits. It is, however, sufficient to lay bare the basic issue, which (as

we have framed it in the first of the six Questions Presented, supra) is "[whether] the executive branch holds a jurisdictional monopoly over the treatment of [non-appearing defendants in draft violation prosecutions]".

For a very long time, Anglo-American courts were content with the sporting theory of justice in criminal cases. As demanded by that theory, they confined themselves to the task of resolving justly such issues as arose in the courtroom. More recently, a broader concern with the entire penal process has been manifested,with this Court taking the lead. More than sixty years ago, it evinced concern for justice in the investigation of crime by adopting the exclusionary rule of Weeks v. United States, 252 U.S. 383 (1914). Since that time the concern for justice throughout the system of penal law administration has surfaced in case after case, e.g., United States v. Wade, 388 U.S. 218 (1967) (identification line-ups); Procunier v. Martinez, 416 U.S. 396 (1974) (legal representation of prisoners); Wolf v. McDonnell, 418 U.S. 539 (1974) (same).

The onetime executive monopoly over jurisdiction to deal with suspected, accused, or convicted persons out of court has thus been broken in one area after another. The one remaining stronghold of that monopoly is the treatment of defendants who have not yet surrendered or been arrested. The callous reference to the indictment of such a person as "simply a statistic" reflects, on the part of the court of appeals, a determination to preserve what remains of the executive monopoly. On the part of the prosecutor, who coined that phrase in the trial court, it betokens that and something more.

The intensity of the government's concern, here evidenced by its application for interlocutory appellate review through the extraordinary remedies of mandamus and prohibition, is attributable to more than a generalized disinclination to lose a jurisdictional monopoly. There is also a political motive. It is common knowledge that the way in which the present administration handles the problem of "putting the war behind us" by clearing away the social wreckage with which that divisive war has bestrewn our society, is a matter of large political significance. The drastic reduction of the sentence of Lieutenant William L. Calley, Jr., has been one small aspect of the effort at reconciliation. The conditional amnesty program is another.

The conditional amnesty program was plainly threatened by our broadly based motion to dismiss in this case, which if granted and later approved by this Court would have provided the functional equivalent of unconditional amnesty to one of the three classes of persons to whom the offer of conditional amnesty was made -- indicted civilian defendants (the other two classes being convicted civilian defendants and military defendants). Even as early as last December, when the government petitioned the court of appeals for mandamus and prohibition, it was fairly clear that the program was a dismal failure -- indeed, a virtually complete failure for one of the three classes, indicted defendants, in which the present petitioners are included. The months since then, which have included a one-month extension of the program, have only served to make that failure indisputable. The failure has resulted not from lack of conciliatory purpose on the part of the executive branch, but because very few of the so-called "fugitives"

have been able to see why they, whose appraisal of the war as a national disaster turned out to be correct, should be required to "earn their way back" into our society by up to two years of prescribed civilian service, when the chief architect of that war in its last four years was granted a blanket pardon and a large cash allowance for readjustment to private life. Only the political need to retain exclusive control of the reconciliation effort can account for the government's fierce determination to keep the treatment of indicted draft case defendants within the exclusive control of the Department of Justice. The recent trial and conviction of former Attorney General John N. Mitchell and former Assistant Attorney General Robert C. Mardian, and the recent guilty plea of former Attorney General Richard Kleindienst, come as timely reminders of the age-old maxim that the executive branch is not the safest repository of absolute official power.

Of course we do not suggest that it is the proper business of courts to administer amnesty. We do maintain that it is the proper business of courts, and of the district courts in particular, to take care that their processes are not used oppressively. That is the main question in this case.

* * * * *

The second, third, and fourth of the Questions Presented (supra) are particularized statements of the first, and being subsumed under it are covered by the foregoing discussion. We now turn to the fifth and sixth questions, which can be dealt with much more briefly.

II. The court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In its zeal to correct what it (erroneously) thought to be an excess or abuse of jurisdiction by the district court, the court of appeals neglected to observe the statutory limits on its own jurisdiction. Its intervention was invoked by the government under the All Writs Act, 28 U.S.C. §1651, which authorizes the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (Emphasis added) This statute provides the only authority for interlocutory appellate review in criminal cases other than the situations for which express provision is made in 18 U.S.C. §3731 (authorizing appeals by the government from dismissals of indictments except where the Double Jeopardy Clause of the Fifth Amendment forbids, and from certain pre-jeopardy evidentiary rulings, neither of which situations exists here). The question, therefore, is whether the court of appeals has any basis for finding that immediate correction of the supposed error of Judge Weinstein was necessary "in aid of", i.e., to protect its own jurisdiction.

On that theory mandamus, prohibition, and common law certiorari have been held permissible means of interlocutory appellate review in a few cases where failure to grant such review would or might prevent the appellate court from ever passing on the controversy.

That was true, for example, in De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945). There, this Court upheld interlocutory review of a district court's preliminary injunction, saying (at 217) that

> no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under §262 [of the Judicial Code, predecessor of the present 28 U.S.C. §1651] it can never be corrected if beyond the power of the court below. (Footnote omitted)

Here there is no such danger that the court of appeals will be ousted of jurisdiction, nor is irreparable injury threatened to any legitimate interest of the government. If the district court entertains motions to dismiss and grants them, the government can appeal under 18 U.S.C. § 3731, since there is no possibility of double jeopardy where the defendant has not appeared. If the district court denies such motions, the government will not have been harmed -- except for the political interest of the executive branch in maintaining its jurisdictional monopoly over defendants exiled through indictment for draft violation, an interest which we have already shown to be unworthy of protection by this Court.

As for the alleged confidential status of Selective Service files, the only persons who

might conceivably be harmed by the opening of such a file to the draft registrant's court-appointed attorney is the registrant, not the government; and the procedure ordered by Judge Weinstein would enable him to enter a protective order with reference to any material which in his opinion the registrant might find personally embarrassing. The government would also be free to apply for such a protective order, upon delivery of the file or a copy thereof to the district court, if its professed concern for the privacy of the registrant is genuine. It should be noted also that the court-appointed defense counsel would be bound by the canons of the profession not to make any use of the file in a manner detrimental to the interests of his client, the registrant.

Since it is plain that the court of appeals has grossly exceeded its own jurisdiction in its zeal to hold a tighter rein on the district courts than the jurisdictional statutes permit, corrective action by this Court is called for.

III. The amendments to the Freedom of Information Act which became effective on February 19, 1975, subsequent to the judgment of the court of appeals, have rendered the controversy partially moot; the judgment of the court of appeals should therefore be vacated with instructions to dismiss the petition for mandamus and prohibition, in so far as it relates to the continued withholding of access to Selective Service files.

Until February 19, 1975, only one thing prevented any member of the public -- a newspaper

reporter, for example, or a federal district judge, or the undersigned attorney in his capacity as a private citizen -- from obtaining access to Selective Service files under the Freedom of Information Act, 5 U.S.C. §552, subsection (a)(3) of which gave to the public full access to all "identifiable records" of federal agencies not exempted by subsection (b). That one thing was the broad exemption for "investigatory files" contained in subsection (b) (7).

Late in 1974, however, Congress enacted over President Ford's veto a number of amendments. Public Law 93-502, 93rd Cong., 2nd Sess., 88 Stat. 1561, Nov. 21, 1974, effective 90 days after enactment. Among other things, the exemption for "investigatory files" was very greatly circumscribed. It is no longer lawful for an agency to withhold such a file except under narrowly defined circumstances, none of which is present here. Even where disclosure of a file would result in unwarranted invasion of personal privacy, the agency can no longer withhold the entire file as was the practice under the previous law. All that can be done is to obtain an appropriate protective order excising the embarrassing or otherwise harmful material -- a procedure which, as noted above, is fully available under the orders of Judge Weinstein which the court of appeals has required him to vacate.

The net of it is that the controversy over the Selective Service files has proved to be a tempest in a teapot. There is no reason for the court of appeals to forbid Judge Weinstein

as a judge to obtain papers that he can now obtain as a citizen. We therefore suggest that the controversy over the files has become moot. In so far as the court of appeals order restricts Judge Weinstein in other respects, however, the case is still alive.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

LOUIS LUSKY
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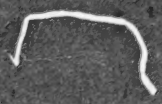
New York, N. Y.
10027

Attorney for Petitioners



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 609—September Term, 1974.

(Argued January 6, 1975 Decided January 30, 1975.)

Docket No. 74-2595

UNITED STATES OF AMERICA,

Petitioner,

—against—

JACK B. WEINSTEIN,
United States District Judge,

Respondent.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG and MANSFIELD, *Circuit Judges.*

Petition for a writ of mandamus directing Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York to vacate orders entered by him directing the Government to produce the Selective Service files of 23 fugitive defendants indicted for Selective Service Act violations so that they might be inspected by an attorney appointed by respondent without defendants' authorization or consent and by amicus curiae for the purpose of discovering evidence that might support proposed motions to dismiss the indictments. Petitioner also seeks an order precluding respondent

from entertaining motions by unauthorized counsel on behalf of the fugitive defendants.

Petition granted.

EDWARD R. KORMAN, Chief Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Brooklyn, N.Y., of counsel), *for Petitioner.*

LOUIS LUSKY, Esq., New York, N.Y., *for Respondent.*

MICHAEL E. TIGAR, Esq., Washington, D.C. (Williams, Connolly & Califano, Washington, D.C., of counsel), *Amicus Curiae* urging denial.

MANSFIELD, *Circuit Judge:*

Pursuant to 28 U.S.C. §1651 the Government seeks a writ of mandamus directing United States District Judge Jack B. Weinstein ("respondent") to vacate orders entered by him in November 1974, requiring the Government to produce the Selective Service files of 23 delinquent registrants who have failed to appear in criminal proceedings pending against them.[1] Judge Weinstein ordered

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1 *United States* v. *David Arthur Lidov*—68 Cr. 67;
United States v. *Michael Rosenbaum*—68 Cr. 204;
United States v. *Barry Lawrence Friedman*—69 Cr. 54;
United States v. *Alan Stephen Dorn*—69 Cr. 57;
United States v. *Arthur Marc Campus*—69 Cr. 182;
United States v. *Maurice A. Henry*—71 Cr. 1338;
United States v. *James Ralph Blumer*—72 Cr. 478;
United States v. *Thomas Martin Austin*—72 Cr. 494;
United States v. *Ronald Edward Territo*—72 Cr. 622;
United States v. *Paul Parker*—72 Cr. 739;

that the files be made available for discovery and inspection by an attorney appointed by him to represent the fugitive defendants without their authority and by another attorney appearing as *amicus curiae*.

Since the purpose of the court-initiated discovery was to determine whether motions might be made by the court-appointed representative for dismissal of the indictments, the Government also seeks an order barring respondent from entertaining such motions. We agree with the Government that the respondent lacks the power to order the Government to make the discovery directed by him and that, absent consent by the defendants, the court-appointed counsel lacks authority to represent them. Accordingly, the petition is granted.

On September 10, 1974, respondent on his own initiative entered an order declaring that the defendants in some 26 Selective Service criminal cases pending before him were allegedly fugitives without representation.[2] He took judi-

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United States v. *Sidney E. Salzmann*—72 Cr. 740;
United States v. *Charles Penn Sleeth*—72 Cr. 757;
United States v. *Alvin Marris Higgs*—72 Cr. 780;
United States v. *Robert Richard Perez*—72 Cr. 803;
United States v. *Albert Antonio Martinez*—72 Cr. 810;
United States v. *Edward James Luerssen*—72 Cr. 824;
United States v. *Michael David Frazier*—72 Cr. 834;
United States v. *Thomas John Collura*—72 Cr. 1028;
United States v. *James Thomas Bezousek*—72 Cr. 1290;
United States v. *Paul Estremera*—72 Cr. 1291;
United States v. *Lester Patrick Nolan*—73 Cr. 41;
United States v. *Michael David Powers*—73 Cr. 126;
United States v. *Kenneth Paul Albanese*—73 Cr. 132.

On January 27, 1975, the Government advised that it no longer seeks relief with respect to defendant Paul Estremera, 72 Cr. 1291, for the reason that, upon being extradited to the United States on other charges, Estremera appointed Jesse Berman, Esq., to represent him in lieu of Professor Lusky, and the Government proposed to turn over his Selective Service file to Mr. Berman for review.

2 One of the 26 cases in which respondent's orders were entered has been terminated by reason of the defendant's death (*United States* v. *Lockwood*, Cr. 43456 (1954)). The Government has moved to dismiss

cial notice that the President and Congress were considering some form of amnesty for fugitives in such cases, which might affect their rights. Without notice to the Government or to the defendants he thereupon appointed Professor Louis Lusky of the Columbia University School of Law to represent the defendants.

Upon learning of the order the Government advised the court that, if the fugitive defendants should return to the United States, it would be willing to cooperate in the handling of the charges against them in a manner consistent with the formulation of new guidelines for such cases, but that in its opinion the court's order was invalid. Following a short stay, respondent held a hearing and within a few hours filed a memorandum decision and order upholding his earlier ex parte order. His memorandum decision took the view that fugitive cases were artificially inflating the caseload of the court and the prosecutor. In order to guarantee "prompt disposition" of these cases he proposed to call them up in accordance with the practice followed by him in the handling of fugitive cases, which was to determine whether the Government was making reasonable efforts to apprehend the fugitives, whether the public or the defendants were being prejudiced by the delay, and whether the indictments should not be dismissed.

Respondent did not state the manner in which the fugitive defendants (or, for that matter, anyone else) might be prejudiced by the pendency of the Selective Service indictments other than to suggest that the President's Amnesty

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two others, one because of the inadvertent destruction of the defendant's Selective Service file (*United States* v. *Wilson*, 69 Cr. 155) and the other because the defendant's induction order had been improperly accelerated on account of his failure to complete and return a form claiming conscientious objector classification (*United States* v. *Dewey*, 66 Cr. 456). Thus the number of cases was reduced to 23 by the time the present petition was filed.

Proclamation, characterized by respondent as a "pretrial diversion or deferred prosecution scheme," might present an unfair choice to guiltless defendants since some of the indictments might turn out to be "invalid" and the President's proposal might subject innocent defendants to pressure to accept the Amnesty Plan "alternative service" rather than face trial. However, respondent did not suggest that, if a fugitive should return to the jurisdiction, he could not obtain a fair trial in which, if the Government should fail to prove its case beyond a reasonable doubt, the defendant would be acquitted.[3] Respondent therefore proposed to "screen" the Selective Service cases in question to determine whether some or all might be dismissed on the basis of defenses disclosed by the Selective Service files. Toward that end, notwithstanding the defendants' absence as fugitives from the jurisdiction and their failure to authorize any such action to be made on their behalf, respondent denied the Government's motion to set aside his September 10, 1974, order.

In proposing to proceed without the presence or authorization of the defendants to decide motions that might be made by respondent's appointee on their behalf, respondent relied upon decisions upholding the court's power, pursuant to Rule 12(b)(2), F.R.Cr.P., *sua sponte* to dismiss an indictment appearing insufficient on its face and to dispense with the defendants' presence upon hearing pretrial motions. However, no authority was cited for the proposition that a trial court might, without a defendant's presence or consent, make an evidentiary disposition of a

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3 Although Judge Weinstein did say "Efficiency rather than fairness may result in the 'relaxation of standards of evidence and a presumption of guilt.' *See* R. W. Balch, Deferred Prosecution: The Juvenilization of the Criminal Justice System, 38 FEDERAL PROBATION 46, 50 (June 1974)," we do not construe this as meaning that the Government would be relieved of its usual burden of proof.

criminal case upon motion of an attorney acting without the defendant's knowledge or consent.

Having appointed Professor Lusky to represent the fugitive defendants, respondent proposed to entertain motions on their behalf to dismiss the indictments on the ground that the defendants had been denied a prompt trial in violation of the defendants' Sixth Amendment rights, even though prompt trials had been rendered impossible by the defendants having fled the jurisdiction and their never having sought a trial. When the Government submitted affidavits attesting to the fugitive status of 23 of the defendants and the Government's good faith efforts to locate and arrest them, respondent denied the motions of his appointed representative, Professor Lusky, to dismiss the indictments for lack of a speedy trial. However, while apparently unable to find the indictments defective on their face, respondent accepted the suggestion of an *amicus curiae*, Michael Tigar, Esq., that Professor Lusky be permitted to inspect the defendants' Selective Service files with a view to determining whether motions might lie to dismiss the indictments on the basis of defenses appearing in the files. When the Government objected on the ground that the court lacked the power to direct such discovery, respondent ordered that the files be turned over to him so that he might make copies available to Professor Lusky and Mr. Tigar. The Government, while refusing to turn over the files for inspection by Messrs. Lusky and Tigar, advised respondent that it was willing to provide a copy of each defendant's file to the defendant or his authorized representative.[4]

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4 The Government has supplied Professor Lusky and Mr. Tigar with the last known addresses of each of the defendants. Upon oral argument Professor Lusky advised that he had communicated with the defendants and expected to be retained by some of them.

On November 26, 1974, respondent granted the Government's request for a 14-day stay pending its filing of the present petition, which was lodged on December 9, 1974.

DISCUSSION

The extraordinary writ of mandamus, which is rarely granted in civil cases, is even less frequently issued in criminal proceedings, principally because of policy reasons based upon the defendant's rights under the Speedy Trial and Double Jeopardy provisions of the Constitution. *Will* v. *United States*, 389 U.S. 90, 96 (1967). Use of the writ as a substitute for appeal or as a means of circumventing the Criminal Appeals Act is barred. *Id.* pp. 96-97; *United States* v. *Weinstein*, 452 F.2d 704 (2d Cir. 1971), *cert. denied sub nom. Grunberger* v. *United States*, 406 U.S. 917 (1972). However, in the unusual case where a district judge has clearly exceeded his powers the petition for a writ of mandamus may be granted, see, e.g., *United States* v. *Smith*, 331 U.S. 469 (1947); *Ex parte United States*, 287 U.S. 241 (1932); *Ex parte United States*, 242 U.S. 27 (1916); *United States* v. *Mayer*, 235 U.S. 55 (1914); *United States* v. *Dooling*, 406 F.2d 192, 198-99 (2d Cir.), *cert. denied sub nom. Persico* v. *United States*, 395 U.S. 911 (1969); *United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974); *United States* v. *Weinstein*, *supra*, even with respect to an interlocutory procedural order, *United States* v. *Carter*, 493 F.2d 704 (2d Cir. 1974); *Hilbert* v. *Dooling*, 476 F.2d 355 (2d Cir.) (*en banc*), *cert. denied*, 414 U.S. 878 (1973).

We believe this to be one of those rare, *sui generis* cases in which unique circumstances require that the writ be granted. For reasons noted below, we are satisfied that the district judge has clearly exceeded his powers. Issuance of the writ will not affect any defendant's constitu-

tional right to a speedy trial, since each is a long-time fugitive who has not sought trial but, on the contrary, by fleeing the jurisdiction, has prevented his case from being brought promptly to trial. Should the indictments be dismissed for failure to comply with the discovery order, the Government is not assured of the right to appeal under 18 U.S.C. §3731. Indeed such an appeal would probably not lie with respect to those cases in which the indictment was filed prior to January 2, 1971, when §3731 in its present form was enacted, see *United States* v. *Apex Distrib. Co.*, 270 F.2d 747 (9th Cir. 1959) (*en banc*), and there is the risk that the Government might be precluded on double jeopardy grounds from appealing dismissals based on facts not appearing on the face of the indictments, see *United States* v. *Jenkins*, 490 F.2d 868 (2d Cir. 1973), *cert. granted*, 417 U.S. 908 (1974); *United States* v. *Velazquez*, 490 F.2d 29 (2d Cir. 1973) (dissenting opinion of Chief Judge Kaufman); Note, Government Appeals of "Dismissals" in Criminal Cases, 87 Harv. L. Rev. 1822 (June 1974).

Turning to the merits, we are satisfied that respondent lacks statutory or inherent power to enter the order challenged by the Government. None of the rules relied upon by respondent supports his action. Rule 16(b), F.R.Cr.P., is unavailing since it authorizes discovery of documentary evidence only upon the defendant's motion and no fugitive defendant in the present case has authorized Professor Lusky to act as his counsel, much less to file such a motion on his behalf. Similarly Rule 17 permits the issuance of a subpoena only upon the request of a "party," which has not been made here. Rule 12(b)(2), which authorizes the court to notice "lack of jurisdiction or the failure of the indictment or information to charge an offense," is limited in scope. See, e.g., *Hughes* v. *Thompson*, —— U.S. ——, 94 S. Ct. 829 (1974). It does not authorize action of the

type undertaken by respondent, such as a court-initiated discovery designed to uncover evidence of non-jurisdictional defenses not appearing on the face of the indictment, which might then become the subject of unauthorized motions to dismiss, even though such defenses may be waived if not raised by the defendants, see, e.g., *United States* v. *Sisson*, 339 U.S. 267, 301 (1969); *United States* v. *Sandbank*, 403 F.2d 38, 40 (2d Cir. 1968), *cert. denied*, 394 U.S. 961 (1969).

Assuming that the Selective Service files were introduced as exhibits before the Grand Jury which filed indictments against the fugitive defendants, Rule 6(e), F.R.Cr.P., which permits disclosure of matters occurring before the Grand Jury "only when so directed by the court," was not designed as an authorization for pretrial discovery. Its purpose, on the contrary, is to protect the secrecy of the Grand Jury proceedings by restricting disclosure to the exceptional case where a particularized need is shown.[5] Since Selective Service files are confidential in nature, see *United States* v. *Weintraub*, 429 F.2d 658, 661 (2d Cir. 1970), *cert. denied*, 400 U.S. 1014 (1971); *United States* v. *Strayhorn*, 471 F.2d 661, 665 n.4 (2d Cir. 1972); 32 C.F.R. §1608.2,[6] they should not be disclosed to persons other than the government officials concerned or to the defendant or his authorized representative. Neither Prof. Lusky nor Mr. Tigar has been authorized by the defendants to inspect their respective files. In any event the in-

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5 In any event it is questionable whether Rule 6(e) applies to documents marked as exhibits before the Grand Jury. Cf. *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960).

6 Section 1608.2 provides in pertinent part that the "records in a registrant's file and the information contained in such records shall be confidential." The regulation appears to have the force and effect of law, see *Paul* v. *United States*, 371 U.S. 245, 255 (1963); *United States* v. *Short*, 240 F.2d 292, 298 (9th Cir. 1956).

dictments are "not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974).

Nor can support for respondent's action be found in Rule 48(b), which permits the court on its own motion to dismiss an indictment, information or complaint "if there is unnecessary delay in bringing a defendant to trial." Aside from the fact that the delay here is attributable to the defendants' flight, the Selective Service files would not be probative on the issue of a delay that must necessarily have occurred after the action taken by the local Selective Service boards.

Lastly respondent's action cannot be analogized to the appointment of counsel to represent absent or legally incompetent persons in civil proceedings. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In such proceedings the judgment of the court is binding on the absent or incompetent party, provided due process requirements are satisfied, whereas in a criminal proceeding any action taken by the court at the behest of a representative appointed without the defendant's knowledge or consent could not bind the fugitive defendant. While a defendant may waive his own presence at a hearing of pretrial motions in a criminal case, see Rule 43, F.R.Cr.P., the attorney moving on his behalf must at least have been authorized by the defendant to act as his counsel in the case. None of the decisions cited by respondent supports the proposition that the court may act upon a motion by an unauthorized attorney appointed by the court itself.

The absence of any statutory or inherent authority for district court action of the type taken by respondent is not surprising. The challenged orders violate a fundamental premise underlying our method of administering justice. Ours is essentially an adversarial, not an inquis-

itorial, system. Whatever may be the judge's role in countries governed by a system of Civil Law, where the judge may by custom engage in investigative or prosecutorial activities, we have chosen to administer justice through courts which are limited to the adjudication of cases and controversies in an adversarial setting. See Art. III, U. S. Constitution; *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). With rare exceptions a federal court is not authorized to act *sua sponte;* an adversarial interest is essential. *Jenkins* v. *McKeithen*, 395 U.S. 411, 423 (1969). Although district judges possess the power to issue writs "in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. §1651, no usage or custom exists that permits a judge to appoint himself or a stranger as the representative of a defendant who has fled the jurisdiction in order to avoid facing criminal charges, at least without the fugitive's authority or consent. Indeed, controlling precedent is to the contrary. The flight of a defendant for the purpose of avoiding prosecution or punishment "disentitles [him] to call upon the resources of the Court for determination of his claims," *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970);[7] see *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *United States* v. *Sperling*, —— F.2d —— (2d Cir. Oct. 10, 1974), Slip Opin. 5637, 5673 n.33; *Dawkins* v. *Mitchell*, 437 F.2d 646 (D.C. Cir. 1970); *People* v. *Genet*, 59 N.Y. 80 (1874). Moreover, at one time the penalty for failure to appear could be an order outlawing the defendant. See Chitty, A Practical Treatise on the Criminal Law (1819 ed.), p. 284.

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7 Molinaro was presaged by Justice Frankfurter's dissenting opinion in *Eisler* v. *United States*, 338 U.S. 189, 192 (1949), to the effect that Eisler's flight from the United States deprived the Court of jurisdiction. "Since the Court is without power effectively to decide against him, it is without power to decide at all."

The administration of justice is not served by the court's unilateral effort to activate the defense of a criminal case in which prosecution has been frustrated by the defendant's flight from the jurisdiction. In the present cases, for instance, the dormant files are mere statistics which do not preclude the active prosecution of hundreds of other pending viable criminal cases against persons located within the jurisdiction. Nor should the pendency of indictments against fugitives who may be innocent inhibit them from returning to the jurisdiction or coerce them into the performance of alternate service under an amnesty plan. The remedy of a guiltless fugitive, assuming some of the defendants may be so classified,[8] is to avail himself of his Sixth Amendment right to a speedy and public trial, with all the constitutional guarantees associated with it.[9] The Government's failure to prove guilt beyond a reasonable doubt will then lead to his acquittal. In the meantime, no public interest is served by proceeding without his consent or authorization.

For the foregoing reasons the petition is granted. A writ will accordingly issue directing respondent (1) to vacate the orders entered by him on November 1, 21 and

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8 Respondent erroneously suggests that, because a large proportion of Selective Service indictments have been dismissed, the indictments which are the subject of his orders may be vulnerable to dismissal on the ground that they "will not be supported by the record." However, the vast majority of such dismissals are attributable to the Government's adherence to a policy of consenting to dismissal upon a defendant's compliance with an order to report for induction or alternative civil work. Hearings before Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 92nd Cong., 2d Sess. p. 396 (1972). The percentage of dismissals because of such compliance with induction orders in the Eastern District of New York is estimated at 85-90%.

9 Indeed, should a defendant's Selective Service file reveal undisputed facts constituting a valid defense to a charge of failure to report for induction, he might seek a dismissal or judgment of acquittal by moving under Rule 12(b)(4), F.R.Cr.P.

26, 1974, ordering that the Selective Service files of each of the above-named 23 fugitive defendants be made available for disclosure to and inspection by Professor Louis Lusky and Michael E. Tigar, Esq., without authority from the defendant whose file is sought, and (2) to cease entertaining motions on behalf of any of the 23 defendants raising non-jurisdictional defenses to the indictments against such defendants, without authority from the defendant or defendants to act on their behalf.

We should make it clear that we do not intend to preclude Judge Weinstein from entertaining motions on behalf of fugitive defendants who have agreed that Professor Lusky or any other attorney represent them. Compare *In re Federal Public Defender*, ———— (D. Ore. 1974) (tentative appointment of lawyer under Criminal Justice Act for fugitive Selective Service defendants, subject to their agreement to be represented and their showing of eligibility under the Act).

APPENDIX B

Memorandum and Order, September 10, 1974

[Caption and appearances omitted]

In each of the above twenty-two Selective Service cases pending before me the defendants have been indicted but the prosecutions have not gone forward because the defendants are allegedly fugitives. As a result of their status no defense counsel have been representing them. In view of current events this lack of legal representation may prejudice their positions.

The court takes judicial notice of the fact that the President and Congress are considering some form of amnesty that may affect the rights of these defendants and thousands of others who are similarly situated.

Accordingly, Professor Louis Lusky, 435 West 116th Street, New York, New York 10027, Telephone Number 212-280-2632, is appointed to represent them. Professor Lusky is a distinguished member of the state bars of New York and Kentucky and of many federal bars; he served as law clerk to the late Chief Justice Harlan F. Stone; he has argued cases in all courts, including the Supreme Court of the United States. He will consult with the United States Attorney and appear before this court at 10:00 A.M. on Friday, September 20, 1974.

The United States Attorney will mail a copy of this Memorandum and Order to each defendant at his last known address. Correspondence from a defendant will be

received; in the absence of a defendant his relative or next best friend will be heard on his behalf.

So ordered.

Dated: Brooklyn, New York
September 10, 1974

/s/ Jack B. Weinstein
U.S.D.J.

APPENDIX C

Memorandum and Order, September 30, 1974

[Caption omitted]

7. Criminal Law ⇐656(3)

Motions addressed to legal sufficiency of indictments can be heard in defendant's absence U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐611.7(1)

Federal district court has power to appoint counsel to appear on behalf of fugitive defendants in selective service criminal cases and to make motions addressed to sufficiency of indictments. Fed.Rules Crim.Proc. rules 2, 50(b), 18 U.S.C.A.; Military Selective Service Act, §§ 1 et seq., 6(j), 50 U.S.C.A. App. §§ 451 et seq., 456(j).

David G. Trager, U. S. Atty., E. D. N. Y., Brooklyn, N. Y., for the United States; Edward R. Korman, Thomas Mahrer, of counsel.

Louis Lusky, New York City, for defendants.

Michael E. Tigar, Williams, Connolly & Califano, Washington, D. C., amicus curiae.

MEMORANDUM AND ORDER

WEINSTEIN, District Judge.

By its order of September 10, 1974, this court appointed Louis Lusky, Esq. to appear on behalf of fugitive defendants in twenty six selective service criminal cases and ordered the United States to give notice of this appointment to each defendant at his last known address. The order provided that the court would receive communications from the defendant, his relative, or his next best friend.

The government moves to vacate the order on the ground that this court lacks jurisdiction to take action in a fugitive case unless the defendant first surrenders. Before turning to the important substantive and procedural issues raised by the government's contention, a word needs to be said on the issue of the court's and the United States Attorney's power to control criminal calendars.

COURT CONTROL OF CRIMINAL CALENDARS

[1] Until a few years ago the practice in the Eastern District of New York was for cases to be listed on a general calendar. When a motion was to be heard or the case brought on for trial, it would be placed on the calendar of whichever judge was hearing motions or trying cases. As a result, many judges might decide different aspects of the same case and, to a considerable degree, counsel could determine which judge would hear a motion by waiting until a particular judge was in a motion part. The United States Attorney had considerable control over criminal calendars. By moving a case for trial or asking for adjournments he could indirectly select the judge. Since no one judge had responsibility for any particular case, unless the United States Attorney made a motion, fugitive cases lay dormant.

The judges of this district adopted an individual assignment system so that litigations could be disposed of more efficiently and fairly. A case is now randomly assigned to a judge immediately after indictment and he is personally responsible for its prompt disposition. Rule 2(b) Individual Assignment and Calendar Rules, Eastern District of New York, effective October 1, 1969.

The individual calendar system is part of an integrated program devised during the past few years by the federal courts to ensure "the prompt disposition of criminal cases." Federal Rules of Criminal Procedure, Rule 50(b). Pursuant to Rule 50(b) the judges of the Eastern District of New York adopted a Plan for Achieving Prompt Disposition of Criminal Cases, effective April 1, 1973, "to further the prompt disposition of criminal cases." In United States v. Furey, 500 F.2d 338, at 341 (2d Cir. 1974), the court noted that the policies supporting the Plan included

> "the deterrence afforded by prompt disposition, the potential prejudice to any defense arising from delay, as

well as the disruption and anxiety created by a criminal charge."

See also United States v. Favaloro, 493 F.2d 623 (2d Cir. 1974); United States v. Bowman, 493 F.2d 594 (2d Cir. 1974); Hilbert v. Dooling, 476 F.2d 355 (2d Cir.) (en banc), cert. denied, 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973); United States v. Pierro, 478 F. 2d 386 (2d Cir. 1973); United States v. Rollins, 475 F.2d 1108 (2d Cir. 1973).

These rules were adopted pursuant to the inherent power of the courts over their calendars. They reflect a policy change from a passive judicial acceptance of laggard work in the courts to an assumption of responsibility for "fairness . . . and the elimination of unjustifiable expense and delay" (Federal Rules of Criminal Procedure, Rule 2) in determining the merits of criminal charges.

In controlling my own calendars one procedure relied upon to guarantee prompt disposition of cases is to periodically call each fugitive case to determine if (1) the government is making reasonable efforts to apprehend the fugitive, (2) the public or defendant is being prejudiced by unnecessary delay, and (3) cases which should be dismissed are carried on the docket, artificially inflating the court's and prosecutor's apparent case load. My own docket illustrates why fugitive cases cannot be ignored. There are now sixty criminal cases assigned to me; two-thirds, or forty, are listed as fugitive cases (including twenty-six selective service cases); five have been assigned trial dates; three are awaiting assignment of trial dates, and twelve are awaiting sentence following a plea or finding of guilt.

All the fugitive cases before me are in the process of being called. Previously, such calls have led to dismissals and action by the government to apprehend defendants. The government has never objected to these calendar calls and the court deems them essential to properly control its calendar.

In the past attorneys for fugitive defendants have not been appointed because there appeared to be no reason to do so. But there is obviously good reason to appoint counsel in the selective service fugitive cases now before the court.

SELECTIVE SERVICE CASES

The twenty-six defendants involved in this motion are covered by the provisions dealing with "draft evaders" in the President's proclamation of September 16, 1974, for they "allegedly unlawfully failed" to meet their obligations under the Military Selective Service Act. That part of the proclamation dealing with these cases reads as follows:

"DRAFT EVADERS—An individual who allegedly unlawfully failed under the Military Selective Service Act or any rule or regulation promulgated thereunder, to register or register on time, to keep the local board informed of his current address, to report for or submit to pre-induction or induction examination, to report for or submit to induction itself, or to report for or submit to, or complete service under Section 6(J) of such act during the period from Aug. 4, 1964, to March 28, 1973, inclusive, and who has not been adjudged guilty in a trial for such offense, will be relieved of prosecution and punishment for such offense if he:

"Presents himself to a United States Attorney before Jan. 31, 1975,

"Executes an agreement acknowledging his allegiance to the United States and the pledging to fulfill a period of alternate service under the auspices of the director of Selective Service.

"Satisfactorily completes such service.

"The alternate service shall promote the national health, safety or interest. No draft evader will be given the privilege of completing a period of al-

ternate service by service in the armed forces.

"However this program will not apply to an individual who is precluded from rendering the United States under 8 U.S.C. 1182(A)(22) or other law. Additionally, if individuals eligible for this program have other criminal charges outstanding, their participation in the program may be conditioned upon, or postponed until after, final disposition of the other charges have been reached in accordance with law.

"The period of service shall be 24 months, which may be reduced by the Attorney General because of mitigating circumstances."

A release of the Office of the White House Press Secretary summarized the procedures to be followed by persons in the draft evader class:

UNCONVICTED DRAFT EVADER

1. Report to United States Attorney where offense was committed.

2. Acknowledge allegiance to the United States by agreeing with the United States Attorney to perform 24 months alternate service or less based on mitigating circumstances.

3. Perform alternate service under the auspices of the director of Selective Service.

4. Director of Selective Service issues certificate of satisfactory completion of alternate service.

5. Receipt by United States Attorney of certificate of satisfactory completion of alternate service.

6. Dismissal of indictment or dropping of charges."

New York Times, September 17, 1974, p. 24, col. 4.

[2] In effect, a pretrial diversion or deferred prosecution scheme is to be applied in these cases. *See e. g.*, Administrative Office of the United States Courts Annual Report of the Director at VIII-7 (1974). This technique is being considered favorably in a number of other types of cases. It is sometimes called the "Brooklyn Plan," for one form was developed in this court. Before or after indictment, but without trial or plea, the defendant is placed under supervision. If he responds favorably over a fixed period of time—usually one or two years—he is not indicted or, if he had been indicted, the indictment was dismissed.

The saving in time and money and the enhancement of the likelihood of rehabilitation make diversion programs attractive. But they present grave dangers unless they are strictly controlled. A guiltless person may be forced to undergo strict supervision and loss of liberty because he wants to avoid the expense and embarrassment of contesting the government's case. Efficiency rather than fairness may result in the "relaxation of standards of evidence and a presumption of guilt." *See*, R. W. Balch, Deferred Prosecution: The Juvenilization of the Criminal Justice System, 38 Federal Probation 46, 50 (June 1974). Some judicial procedural check is necessary.

"Without judicial and defense counsel intervention in the diversion decision to safeguard against potential abuses of discretion, there is the danger that the results of pretrial diversion—like those of the juvenile court which itself began as a diversion mechanism—may be found not to justify the risks taken with basic constitutional guarantees."

Note, Pretrial Diversion from the Criminal Process, 83 Yale L.J. 827, 853 (1974).

Some method must be utilized to prevent abuse of plans which divert cases from the normal criminal machinery to ensure that individual rights are being safeguarded. The agency with primary responsibility to prevent prosecutorial abuse after indictment is the court.

[3, 4] While an indictment against a defendant remains outstanding, the pressure on him to agree to perform "alter-

nate service" is great even though the indictment may be invalid and there is no warrant in law for his being denominated a draft evader. We take judicial notice of the fact -based upon experience with many young men in this court accused of selective service violations -- that a number of them are inexperienced and not capable of determining their rights without counsel. Some have taken emotional positions, fleeing when their problems could easily have been resolved to their own and the government's satisfaction had they had competent legal advice. It is significant that private counsel generally were not permitted to accompany men appearing before local selective service boards. *See*, Levine v. Selective Service Loc. Bd. No. 18, 458 F.2d 1281 1287, n. 22 (2d Cir. 1972). This fact alone resulted in many errors; the lay boards with all their fine intentions and devotion to the public good, often made mistakes through lack of legal guidance.

The possibility that a selective service indictment will not be supported by the record is not insubstantial. As the table set out below indicates, a large portion of the selective service cases considered by the courts are dismissed.

DISPOSITION OF DEFENDANTS CHARGED WITH SELECTIVE SERVICE VIOLATIONS

Year	Total	Dismissed Number	%	Acquitted Number	%	Total Convicted Number	%	Probation, Fine & Other Number	%	Average Imprisonment (Months)
1965	341	88	25.8	11	3.2	242	71.0	53	15.5	31.0
1966	518	132	25.4	13	2.5	373	71.9	70	13.6	36.4
1967	956	224	23.5	36	3.8	746	78.1	82	9.2	32.1
1968	1,193	253	25.6	55	4.6	784	65.8	238	17.1	27.3
1969	1,944	767	42.8	97	5.4	980	51.6	356	20.4	36.3
1970	2,832	1,570	55.4	236	8.3	1,027	36.3	977	38.4	33.3
1971	2,973	1,701	57.2	236	7.9	1,036	34.9	959	32.3	30.1
1972	4,906	2,933	59.9	337	6.7	1,442	33.7	1,196	24.1	33.0
1973	5,493	3,338	60.9	180	3.2	977	30.6	719	30.3	17.5

Source: 1974 Semi Annual Report of the Director, Administrative Office of the United States, 62 (May 1974)

It is significant that in 1973 in the country as a whole more than two-thirds of the selective service indictments terminated were dismissed. Only seven percent of defendants whose cases were disposed of by the courts were imprisoned; the average term was 17.5 months before time off for good behavior. Many of those convicted were sentenced under the Youth Correction Act so that, upon completion of their supervision, they were granted a certificate setting aside their conviction. 18 U.S.C. § 5021. It is apparent that the overwhelming majority of those indicted whose cases were disposed of by the courts in 1973 received more "lenient" treatment than would be accorded under the President's proclamation. There is no reason to suspect that the clear trend against severity in these cases will be reversed in 1974.

Both from the point of view of effective calendar control and protection of the rights of those accused of draft evasion, it is desirable to screen these selective service cases to determine if they have any merit. But the government contends that the court lacks power to do this unless the defendant first surrenders, the question to which we now turn.

POWER OF THE COURT TO DECIDE MOTIONS ON BEHALF OF FUGITIVES

[5] It is unusual for the government to urge the court's lack of power to determine matters in the absence of a defendant. The rules against trials in absentia were designed to protect the defendant's, not the government's, rights. *See, e. g.*, the right to confrontation in the Sixth Amendment. As Mr. Justice

Cardozo pointed out in Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-106, 54 S.Ct. 330, 332, 78 L.Ed. 674, 678 (1934):

"[t]he defendant has the privilege . . . to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." (Emphasis supplied.)

The court rejected the need for the defendant's presence "when presence would be useless, or the benefit but a shadow." *Id.* at 106-107, 54 S.Ct. at 332, 78 L.Ed. at 678.

Certainly the defendant cannot be present at preliminary phases of the criminal proceeding such as indictment. Normally he is not required to be present on calendar calls or the argument of preliminary motions. Under Rule 12 of the Federal Rules of Criminal Procedure, motions raising defenses and objections must be made before a plea is entered unless the court permits otherwise, suggesting that the defendant need not be present. *See*, United States ex rel. Coleman v. Cox, 47 F.2d 988 (5th Cir. 1931), holding that the defendant need not be produced in order to permit the court to pass on a demurrer to the indictment. Rule 43 of the Federal Rules of Criminal Procedure is explicit in requiring his presence at arraignment, trial and sentence, suggesting again that the defendant's presence is unnecessary at pretrial motions when there is no evidence being taken and, therefore, no need to confront witnesses.

In United States v. Lynch, 132 F.2d 111 (3d Cir. 1942), cert. denied, 318 U.S. 777, 63 S.Ct. 831, 87 L.Ed. 1146 (1943) the court ruled that no constitutional right had been violated by the lack of the defendant's presence during a hearing to vacate judgment and sentence:

"We do not understand that the right of a defendant to be present in court throughout his trial has ever been considered to embrace a right to be present also at the argument of motions prior to trial or subsequent to verdict." 132 F.2d at 113.

See also, United States v. Gradsky, 434 F.2d 880 (5th Cir. 1970), cert. denied sub nom. Roberts v. United States, 401 U.S. 925, 91 S.Ct. 881, 27 L.Ed.2d 828 (1971); United States v. Malinowski, 347 F.Supp. 347 (E.D.Pa.1972), aff'd. 472 F.2d 850 (3d Cir.) cert. denied, — U.S. —, 93 S.Ct. 2164, 36 L.Ed. 2d 693 (1973). This circuit has even held that the presence of a defendant during a pretrial suppression hearing was not mandated by the Sixth Amendment. The defendant's absence "did not jeopardize his ability to confront witnesses testifying as to his guilt and the incidents surrounding his frisk, or hinder the effectiveness of his counsel's assistance." United States v. Bell, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972). Even in habeas corpus matters, the prisoner need not be present for the argument of the motion to determine whether he needs to be produced for a hearing. 28 U.S.C. § 2243; United States v. Hayman, 342 U.S. 205, 222, 72 S.Ct. 263, 274, 96 L.Ed. 232, 243 (1952).

The position that the court may act prior to the defendant's surrender was recently recognized by Mr. Justice William O. Douglas, sitting as Circuit Justice on a stay application in Hughes et al. v. Thompson, Judge, 415 U.S. 1301, 94 S.Ct. 829, 830, 39 L.Ed.2d 93 (1974). He declared:

"Under the Rules of Criminal Procedure the question of the sufficiency of the indictment 'shall be noticed by the court at any time.' Rule 12(b)(2). *Whether the motion should be disposed of prior to the arraignment rests in the sound discretion of the District Court.* The District Court certainly has the power to follow that course and sometimes it may be important to prevent harassment or the use of other unconstitutional procedures against the accused." (Emphasis supplied.)

Exercising the power which Justice Douglas had declared it to possess, the

district court considered the validity of the indictment, found it to be insufficient on its face, and dismissed it, although the court had not acquired jurisdiction of the person of the defendant (who may have remained outside the United States while these proceedings were taking place). *See* United States v. Hughes, No. LV 2843 BRT (D.Nev. 1974). Reporter's transcript at 97-103. *Cf.* Petition for Writ of Mandamus, Jason v. Coffrin, 74 2010 (2d Cir. 1974); Petition for Rehearing and Suggestion of Appropriateness of a Rehearing En Banc in United States v. Davies, 74-1161 (3d Cir. 1974); United States v. Barnette, 27, 807 (W.D.Ky., January 28, 1974) (order of dismissal).

To support its position that this court lacks power to consider these fugitive matters, the United States relies primarily upon two cases: Molinaro v. New Jersey, 396 U.S. 365, 366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586, 588 (1970) and Lewis v. United States, 146 U.S. 370, 373, 13 S.Ct. 136, 137, 36 L.Ed. 1011, 1012-1013 (1892). Neither warrants abnegation of this court's jurisdiction to control its calendar.

[6] *Molinaro* represents the well known proposition that an appellate court may, *in its discretion*, refuse to hear a case in which a defendant has fled the jurisdiction. *See, e. g.*, Eisler v. United States, 338 U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949); Johnson v. Laird, 432 F.2d 77 (9th Cir. 1970); Hitchcock v. Laird, 456 F.2d 1061 (4th Cir. 1972); *cf.* Dawkins v. Mitchell, 141 U.S.App.D.C. 213, 437 F.2d 646 (1970). As Mr. Justice Murphy stated in his dissent in *Eisler*, courts should not always express their displeasure with fugitive parties by refusing to adjudicate a claim that there is no basis for the charges brought against them:

> Law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile. . . . Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties. 338 U.S. at 194-195, 69 S.Ct. at 1456, 93 L.Ed. at 1901.

[7] The dictum in *Lewis* "that, after indictment found, nothing shall be done in the absence of the prisoner," 146 U.S. at 372, 13 S.Ct. at 137, 36 L.Ed. at 1012, is not controlling. As already pointed out, it has no necessary application to motions addressed to the legal sufficiency of indictments, which can be heard in the defendant's absence.

No constitutional inhibition against court action to determine the validity of a criminal charge absent a defendant was inserted into our Constitution by its draftsmen; there was no reason to consider the issue. Contemporary common law in England condemned fugitives through the process of outlawry. Blackstone's Commentaries On The Law, Ch. XXIV, 498 498 (Gavit ed. 1941); 1 J. Chitty, Criminal Law 347 et seq. (1816). This procedure was undoubtedly well known to colonial lawyers who relied heavily on Blackstone. A determination of outlawry was made *ex parte* but was subject to highly technical rules and reversals on writ of error. At least in non-capital (non-treason and non-felony cases), writs of error as to outlawry proceedings could be obtained by an attorney without the defendant being present, if the outlawry was before conviction. 1 J. Chitty, Criminal Law 369 (1819). This rule did not apply to treason and felony cases, apparently because there was no right to counsel in such cases at that time. It appears as if a relative was permitted to object and suggest error in the process even in a felony case in the absence of a deceased defendant. *See* 4 J. Chitty, Criminal Law 238 (1816). *But cf.*, People v. Genet, 59 N. Y. 80 (Sup.Ct.1874).

The court's right to hear from counsel on behalf of a defendant on legal issues, even during the period when a defendant had no right to counsel, was established long before adoption of our own Constitution. *See, e. g.*, 1 J. Chitty, Criminal Law 408 (1816); R. v. Lilborne, 4 Howell's State Trials 1270

(1613) (counsel on legal points); R. v. Ratcliff, 18 Howell's State Trials 430 (1746). As Chitty points out (ibid):

"it is certain, that any one may, as amicus curiæ, inform the court of any error in the proceedings [of outlawry], of which they are bound to take cognizance."

CONCLUSION

[8] The court has an interest in clearing its docket of invalid indictments and has the power to appoint counsel authorized to make motions addressed to their conscience. That was the evident purpose of the September 10th order. We need not and do not hold that the appointment carried with it the authority to speak or act for the defendants on matters relating to their guilt or innocence of the offense charged.

The government's motion to set aside this court's order of September 10, 1974 is denied.

So ordered

Lori PAIGN et al., Plaintiffs,
v.
J. Wallace LA PRADE et al.,
Defendants.
Civil A. No. 1091-72.

United States District Court,
D. New Jersey.
Aug. 29, 1974.

In an action for alleged violation of constitutional rights and of alleged rights under a postal statute, the District Court, Coolahan, J., held that where plaintiff failed to show injury to her reputation or other form of injury because of a mail cover requested by the Federal Bureau of Investigation on a political party or from a personal investigation instituted because of her corresponding with such political party, she was not entitled to recover for alleged deprivation of civil rights.

Defendant's motion for summary judgment granted in part; plaintiffs' motion for injunctive relief granted in part.

1. Post Office ⇐53

Statute providing for fine or imprisonment for the taking of any letter, etc., from post office, etc., before it has been delivered, with design to obstruct, etc., is criminal statute, and does not give rise to any civil right of action. 18 U.S.C.A. § 1702.

2. Federal Civil Procedure ⇐181

Where particular plaintiff's interest in political party was momentary and academic, and investigation of her was quickly terminated, and it was not shown that other persons investigated pursuant to same mail cover had such mild contact with the party or were cleared of suspicion as completely as the particular plaintiff, her claims were not shown to be representative for purposes of class action. Fed.Rules Civ.Proc. rule 23(a, e), (1, 3), 28 U.S.C.A.

3. Civil Rights ⇐13.1

Where plaintiff failed to show injury to her reputation or other form of injury because of mail cover requested by Federal Bureau of Investigation on political party or from personal investigation instituted because of her corresponding with such political party, she was not entitled to recover for alleged deprivation of civil rights. 18 U.S.C.A. § 1702; U.S.C.A.Const. Amends. 1, 4-6.

4. Civil Rights ⇐13.16

Where plaintiff failed to show "direct injury" from alleged deprivation of civil rights, there was no judicial power to award damages or injunctive relief, except that where there was no legal justification for continued possession by Federal Bureau of Investigation of personal file concerning plaintiff, court would order its removal from governmental cus-

body and its destruction. U.S.C.A.Const. Amends. 1, 4, 6.

Frank Askin, Newark, N. J., for plaintiffs.

Henry E. Petersen, Asst. Atty. Gen., Washington, D. C., Jonathan L. Goldstein, U. S. Atty., Newark, N. J., David H. White, Dept. of Justice, Washington, D. C., for defendants.

OPINION

COOLAHAN, District Judge.

On January 11, 1973 the Director of the Federal Bureau of Investigation (FBI) requested the United States Postal Inspection Service to institute a 120-day mail cover on the national headquarters of the Socialist Workers Party (SWP) in New York City.[1] The mail cover was executed by a foreman in the New York City Post Office, who copied the information found on the envelopes of letters sent to the SWP. All information was forwarded to the New York City division of the FBI. In the course of this mail cover, the name and address of plaintiff Lori Paton were found. Plaintiff Paton's name and address were sent to defendant Special Agent in Charge La Prade of the Newark, New Jersey, FBI office. After it was ascertained that the Newark FBI files contained no information about her, Special Agent John Devlin of the Paterson, New Jersey, Resident Agent Office was assigned to investigate plaintiff Paton.

Devlin confirmed, through use of a local area directory, that plaintiff Arthur H. Paton (Lori Paton's father) lived at the address found on the letter surveyed in the mail cover. Through inquiries at a local credit bureau, Devlin learned the past and present addresses of Lori Paton's parents and the past and present places of employment of her father. Devlin interviewed Chester Township Chief of Police Edward Strait, who informed Devlin that no member of the Paton family had a criminal record. West Morris-Mendham Park High School Principal Richard Matthews and Vice Principal Gerald Work were interviewed by Devlin. The agent learned that Lori Paton was a student at the High School and was enrolled in a course entitled "Left to Right" which involved the writing of letters to political organizations of various persuasions.

Devlin concluded his investigation with his visit to the High School and reported on his findings to La Prade on April 2, 1973. A memorandum dated May 7, 1973, written by Special Agent John H. Bryan at Newark to La Prade, stated:

> In view of the fact that the subject is a high school student who apparently contacted the national office of the SWP in New York for information for one of her courses and, due to the fact that she is not believed to be involved in subversive matters, it is recommended that this case be closed administratively.

The FBI has produced, and plaintiffs have filed with this Court as part of the public record in this action, the foregoing memorandum of Special Agent Bryan and the remaining FBI files in the Paton investigation. (See Government brief at 4.) The FBI has revealed further that "Plaintiff Paton's file carries the filing symbol '55M SWP', standing for 'Subversive Matter-Socialist Workers Party', which identifies the larger investigation of which the inquiry respecting her was a part."

[1] Lori Paton, suing by her father, and William Gabrielson, her teacher in the course "Left to Right," are plaintiffs of record here. Plaintiffs have brought suit on the grounds that defendants have violated plaintiffs' rights under 18 U.S.C. § 1702[2] and the following

1. At the time of the mail cover the SWP was on the Attorney General's list of subversive organizations. The list has since gone out of existence.

2. 18 U.S.C. § 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from

APPENDIX D

Memorandum and Order, November 21, 1974

[Caption and appearances omitted]

On November 1, 1974, after a full hearing, the court, for reasons stated on the record, ordered the United States to turn over to the counsel for the defendants the selective service files which were the predicate for the indictment in each of the above cases. On request of the government a stay was granted pending filing of briefs. Those briefs have been filed and considered by the court. No reason has been given by the government which would warrant a further stay or revocation of this court's order of November 1, 1974. Accordingly the stay is vacated.

Normally the practice in this district is for the United States Attorney to xerox a copy of the selective service file and to present it to the defendant in order to make it more convenient for both the United States Attorney and defense counsel to proceed with the litigation expeditiously. By letter dated November 20, 1974, the United States notified the court:

> "The reproduction of the entire Selective Service file in each of these cases will involve a substantial expense that the United States is not required to bear under Rule 16(b) which provides only that 'the court may order the attorney for the government to permit the defendant to inspect and copy or photograph ***' the materials there described."

Rather than further embarrass the United States on this matter, the court directs that the files be made available by delivering them, or a copy, to this court in chambers within five days. This court will then have its own personnel produce a

copy for counsel for the defendants and one for the amicus curiae. Counsel for the defendants and the amicus curiae will hold the copies for the defendants.

The Clerk of the Court shall send a copy of this Memorandum and Order to counsel for the defendants, counsel for the government and to the amicus curiae.

So ordered.

Dated: Brooklyn, New York
November 21, 1974

/s/ Jack B. Weinstein
U.S.D.J.

APPENDIX E

Memorandum and Order, November 26, 1974

[Caption and appearances omitted]

Counsel for twenty-six defendants accused of violating the selective service law moves to dismiss the indictments on the ground that all the defendants have been denied their right to a speedy trial. Amicus suggests that there is a strong likelihood that some or all of the indictments are not well founded under the selective service law. Until each defendant's situation has been examined separately, dismissal on these grounds will not lie. As indicated below, the government has been directed to supply counsel with copies of the selective service file in each case to facilitate the necessary individual determination.

As additional grounds for dismissal of the indictments defendants claim that the Selective Service Act and regulations are unconstitutional as applied to these cases, in that they (1) provide for military conscription for service in wars not declared by Congress pursuant to Article I, Section 8, Clause 11 of the United States Constitution, and (2) provide for such conscription in the absence of either a declaration of war by Congress or a national emergency so grave and imminent as to justify peacetime conscription without such a declaration of war. While these claims have not yet been passed upon by the United States Supreme Court, similar claims have been rejected by the Second Circuit Court of Appeals in Orlando v. Laird, 443 F. 2d 1039 (1971), cert. denied, 404 U.S. 869 (1971) (Douglas and Brennan, JJ., dissenting), and in Da Costa v. Laird, 448 F. 2d 1368 (1971), cert. denied, 405 U.S. 979 (1972) (Douglas and Brennan, JJ., dissenting). Being bound by the decisions of the Second Circuit, these additional claims

must be denied by this court without an independent consideration of their merit.

I.

DELAY IN BRINGING THESE CASES TO TRIAL

One of the indictments in these cases has been pending since 1954; the others were handed up at various times between 1966 and 1973, the most recent having been filed with the clerk on February 6, 1973. During this period the government has made desultory efforts to apprehend the defendants by mailing notices to addresses once listed in selective service records and by occasional inquiries through the Federal Bureau of Investigation.

II.

SPEEDY TRIAL RULES

No claim has been made of a violation of the Eastern District of New York's Plan for Achieving Prompt Disposition of Criminal Cases. Effective April 1, 1973, it was designed "to further the prompt disposition of criminal cases." According to this Plan the government must be ready for trial within six months, excluding delay resulting from the absence of unavailability of the defendant. On the basis or information how available it cannot be said that the defendants were available for trial. Cf. United States v. Rollins, 487 F. 2d 409 (2d Cir. 1973); United States v. Flores, slip op. 74-1186 (2d Cir. Aug. 7, 1974). Counsel instead relies upon defendants' constitutional right to a speedy trial as guaranteed by the Sixth Amendment.

III.

SIXTH AMENDMENT

The right to a speedy trial has long been considered fundamental. See the dissertation of Chief Justice Warren in Klopfer v. North

Carolina, 386 U.S. 213, 224, 87 S. Ct. 988, 994, 19 L. Ed. 2d 1 (1967).

Recognizing that a time within which a trial must be had cannot be fixed for all cases with uniformity and precision, Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), mandates an analysis of the practical and theoretical aspects of the right to a speedy trial in the context of each individual case. Laid down was a balancing test requiring a weighing of the conduct of both the prosecution and the defendant on scales calibrated to reflect the interests of defendants, society and the Constitution.

Four factors must be assessed in determining whether a particular defendant has been deprived of his right: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. 407 U.S. at 530, 92 S. Ct. at 2187. The Supreme Court regarded none of these factors as decisive.

> "Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." 407 U.S. at 533, 92 S. Ct. at 2193.

See also, e.g., United States v. Lasker, 481 F. 2d 229, 237 (2d Cir. 1973), cert. denied, -- U.S. -- ( ); United States v. Infanti, 474 F. 2d 522, 527 (2d Cir. 1973); United States v. Counts, 471 F. 2d 422, 426-27 (2d Cir.), cert. denied, 411 U.S. 935, 93 S. Ct. 1909, 36 L. Ed. 2d 395 (1973); United States v. Fasanaro, 471 F. 2d 717 (2d Cir. 1973); United States v. Colitto, 319 F. Supp. 1077 (E.D.N.Y. 1970).

Certainly the length of delay in prosecuting these indictments is sufficient to cause us to inquire into the other factors that go into the balance. The delay, of course, is mitigated by the reason for the delay -- in this case, the government's alleged inability to bring the defendants before the court.

Defense counsel argues that the government did not prosecute these defendants with due diligence in two respects. First, it contends that the return of the defendants was not sought through diplomatic channels. As recently as 1972, it was reported, and not denied, that the government did not request other governments to extradite or deport selective service indictees. See Gosfield, American War Resisters, 5 N.Y.U.J. Int'l L. & Pol. 503, 522 (1972). It is urged that the standard used by the Supreme Court in Smith v. Hooey, 393 U.S. 374, 393, 89 S. Ct. 575, 579, 21 L. Ed. 2d 607 (1969), where the Court decided that it was a state's duty to bring to trial a defendant incarcerated by authorities beyond its territorial jurisdiction, should be applied here. The situations, however, are not analogous. The practical relationship between state authorities and between state and federal authorities differs from that between our government and a foreign government. Id. at 380-381, 89 S. Ct. at 578-579.

Moreover, the political climate existing at the time must be considered in judging the reasonableness of the government's efforts. We take judicial notice of the fact that the governments and populace of the countries in which many draft fugitives sought asylum had expressed antipathy toward this country's participation in the Vietnam war. See, e.g., N. Y. Times, Nov. 3, 1974, § 6 (Magazine), 51, 66. American public opinion was also divided. Pressing strenuously for extradition might have seriously exacerbated feelings of hostility both at home and abroad. Given the serious doubt about whether any extradition treaty applied to what these other countries

may have considered political rather than criminal offenses, the decision not to seek extradition in all cases does not appear unreasonable. See generally 2 A Treatise on International Criminal Law 309-355 (M. C. Basiouni & V. Nanda eds. (1973) (military and political offenses generally not extradictable); Tate, Draft Evasion and the Problem of Extradition, 32 Albany L. Rev. 337, 355-57 (1968) (political offenses not extradictable). These factors, while not directly relevant to those normally associated with delays in the administration of justice -- e.g., absence of witnesses and calendar congestion -- do have a bearing on the bona fides of the government's action.

Nevertheless, the government's decision not to utilize legal process to attempt to return these fugitive defendants must be weighed against the importance of individual rights. The right to a speedy trial cannot be ignored merely because the government determines that extradition or other procedures are inconvenient or unavailable. In some situations, the Supreme Court has ruled that where individual rights are at stake, the government, unless it adheres to constitutionally mandated procedures, must suffer a dismissal of its indictment. Alderman v. United States, 394 U.S. 165, 183, 89 S. Ct. 961, 972, 22 L. Ed. 2d 176 (1969). In other cases, such as that involving the disclosure of an informant's identity, the Court has found that there is no fixed rule: "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." Roviaro v. United States, 353 U.S. 53, 62, 77 S. Ct. 623, 628-29, 1 L. Ed. 2d 639 (1957). See also United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953); United States v. Fernandez, slip op. 74-1164 at 282-83 (2d Cir. Nov. 6, 1974). Since, as we have noted, the second approach, calling for the balancing of a number of factors, is to be applied to speedy trial contentions, the government's action, or inaction, is not conclusive.

Second, defense counsel asserts that the government had a duty to seek out the defendants with all the investigative resources at its command and to summon before a grand jury parents, relatives, and friends, to testify as to the whereabouts of the accused. Courts have not, in general, recognized any privilege of a mother, father, relative or friend to refuse to testify on grounds analogous to those underlying the husband-wife privilege. Yet, the absence of any such rule of privilege should not be construed as a prosecutorial imperative to place parents and friends in such a difficult and conscience-taxing position. Cf. Branzburg v. Hayes, 408 U.S. 665, 707-708, 92 S. Ct. 2646, 2670, 33 L. Ed. 2d 626 (1972). The essence of justice includes not only an adherence to legal rules, but an element of compassion. See generally Jones, An Invitation to Jurisprudence, 74 Colum. L. Rev. 1023, 1050-53. The logic of the right to a speedy trial should not be pushed to an unnecessary extreme so that justice becomes an uncontrollable juggernaut, crushing the innocent bystander as well as the guilty.

Under the circumstances thus far brought to the court's attention, it does not appear that the delay in bringing these defendants to trial was caused either by the negligence or the inefficiency of the government. Nor was there, so far as the record now shows, a deliberate effort on the part of the government to delay all these trials. See Barker v. Wingo, supra, 407 U.S. at 531, 92 S. Ct. at 2182; Pollard v. United States, 352 U.S. 354, 361, 77 S. Ct. 481, 486, 1 L. Ed. 2d 393 (1957); United States v. Infanti, supra, 474 F. 2d at 527; United States v. Stein, 456 F. 2d 844 (2d Cir. 1971), cert. denied, 408 U.S. 922, 92 S. Ct. 2489, 33 L. Ed. 2d 333, reh. denied, 409 U.S. 898, 93 S. Ct. 101, 34 L. Ed. 2d 157 (1972). We take judicial notice of our own court records establishing that where defendants have appeared, the government has prosecuted selective service cases no less expeditiously than other kinds of cases.

The remaining factors to be considered in the balance are the defendant's assertion of his speedy trial right and the prejudice to the defendant. Although we do not find that defendants have waived their speedy trial claim, they have not heretofore asserted their right. This factor is not conclusive but the Supreme Court indicated in Barker that it is entitled to great weight:

> "Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely is the defendant to complain, The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 531-532, 92 S. Ct. at 2192.

See also United States v. Mancino, 486 F. 2d 750, 753 (7th Cir. 1973). Cf. United States v. Holt, 448 F. 2d 1108, 1111 (D.C. Cir.), cert. denied, 404 U.S. 942, 92 S. Ct. 292, 30 L. Ed. 2d 256 (1971).

We must also consider the fact that these defendants may not have been aware of their rights. We take judicial notice of the fact that many young men indicted under the Selective Service Act were without counsel. It is, therefore, likely that they did not know that they were entitled to a speedy trial or that the failure to promptly demand one might have serious adverse consequences See United States v. Butler, 426 F. 2d 1275,

1278 (1st Cir. 1970), cert. denied, 401 U.S. 978, 91 S. Ct. 1207, 28 L. Ed. 2d 328 (1971); Coleman v. United States, 442 F. 2d 150, 155 (D.C. Cir. 1971).

Prejudice to the accused is not insubstantial. The anxiety and concern caused by these indictments to the defendants, their families and friends, is significant. See United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468 (1971); Note, The Right to a Speedy Trial, 57 Colum. L. Rev. 846, 864 (1957). In addition, the ability of these defendants adequately to prepare their cases may have been affected.

In each case the factors to be weighed may balance differently. In light of all the relevant considerations thus far brought to the court's attention, it cannot be said that a blanket motion to dismiss all these cases on the ground of denial of a speedy trial can be granted. Facts to be developed in the individual cases will be considered with those already brought to the court's attention by defense counsel should motions be renewed in the individual cases.

IV.

VALIDITY OF INDIVIDUAL INDICTMENTS

The court has an independent obligation to review the current status of all indictments on its calendar, and to dismiss those which are clearly invalid. United States v. Lockwood, -- F. Supp. --, -- (E.D.N.Y. 1974); United States v. Kibbe, -- F. Supp. -- (D. Conn. 1974); United States v. McKinney, -- F. Supp. -- (E.D. Calif. 1974). See also District of Columbia v. Horning, 47 U.S. App. D.C. 413 (1918). This obligation is essentially one of speedily and justly determining every case before the court, and is independent of, and to some extent may be contrary to, the defendant's wishes in the

matter. Barker v. Wingo, 407 U.S. 514, 521, 92 S. Ct. 2182, 2187, 33 L. Ed. 2d 101 (1972); Dickey v. Florida, 398 U.S. 30, 37-38, 90 S. Ct. 1564, 1569, 26 L. Ed. 2d 26 (1970).

In Hodges v. United States, 408 F. 2d 543 551 (8th Cir. 1969), the court observed that the right to a speedy trial is constitutionally guaranteed and as such it [sic. is] not to be honored only for the vigilant and the knowledgeable: "[T]he trial court, which is the neutral arbiter for the defense as well as for the prosecution, must do all it can to keep its criminal dockets current." See also United States v. Mann, 291 F. Supp. 268 (S.D.N.Y. 1968).

The considerations advanced by this court in its prior opinion suggest that there is an obligation to look beyond the face of these indictments to determine their validity. As we stated, "[t]he possibility that a selective service indictment will not be supported by the record is not insubstantial." United States v. Lockwood, supra at --. In order to determine if these indictments have any merit each defendant's selective service file must be examined.

A further consideration arises from the unique nature of selective service cases. In criminal prosecutions involving selective service registrants who have refused to submit to induction, judicial review of a classification determination by a draft board must be based only upon material in the registrant's file. See, e.g., Witmer v. United States, 348 U.S. 375, 75 S. Ct. 392, 99 L. Ed. 428 (1955); Cox v. United States, 332 U.S. 442, 453-55, 68 S. Ct. 115, 120-21, 92 L. Ed. 59 (1947), reh. denied, 333 U.S. 830, 68 S. Ct. 449 (1948); United States ex rel. Checkman v. Laird, 469 F. 2d 773 (2d Cir. 1972); United States v. St. Clair, 293 F. Supp. 337 (E.D.N.Y. 1968).

The court recognizes that there is an interest in the confidentiality of these files. This

interest, however, must yield to the public interest in having essential evidence relating to a defense in a criminal case considered by the court. Cf. Mackey v. United States, 351 F. 2d 794 (D.C. Cir. 1965)(police records); United States v. Abbott, 425 F. 2d 910, 913, n. 4 (8th Cir. 1970) (selective service registrant's right to see file); Sheats v. United States, 215 F. 2d 746 (10th Cir. 1954)(same). Cf. United States v. United States Gypsum, 43 U.S.L.W. 2194 (W.D. Pa. Oct. 21, 1974). It is partly for this reason that defense counsel has an absolute right to see the selective service files pertaining to his client.

In United States v. Abbott, 425 F. 2d 910, 913, n. 4 (8th Cir. 1970), the court stated:

> "It is well settled that a registrant is entitled to know the content of his file so as to be aware of any adverse evidence therein. . . . Fundamental due process requires that the defendant be entitled to either know or be able to infer from the file itself the basis for the rejection of a . . . claim."

Moreover, to the extent that the files may provide a basis for dismissing these cases, their production is counseled, if not mandated, by Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Recognizing this right to see the files, the policy of the Selective Service System is to ensure that an indicted registrant be provided with a copy of his file in order to adequately prepare his defense. 32 CFR § 1608.3(e) provides in relevant part:

> "Where a registrant has been indicted under the military Selective Service Act and must defend himself in a criminal

> prosecution . . . to test the validity of his induction, it is the policy of the Selective Service System to furnish, to him or to any person he may designate, one copy of his selective service file free of charge."

Indictments in selective service cases in this district are based almost entirely on the file. Thus, where the validity of an indictment is being questioned, the defendant or his appointed counsel is entitled to examine the registrant's file.

The issue of validity of the indictment may be congruent with the general issue, as the government suggests. See United States v. Cesaletti, -- F. Supp. -- (D.N.J. 1974). But since selective service prosecutions consist essentially of judicial review of an administrative record, the court can determine the legal validity of the indictments without trying the issue or providing a defense of double jeopardy.

Once counsel has examined each selective service file, he may present the court with additional information sufficient to alter the weight of the variables in the speedy trial equation. In addition, other factors may be revealed as a basis for the dismissal of these indictments. For example, courts have found that the pre-indictment delay in selective service cases before them violated the special statutory mandate regarding the prosecution of selective service cases. 50 U.S.C. App. § 462(c). See United States v. Daneals, 370 F. Supp. 1289 (W.D.N.Y. 1974); United States v. Golon, 378 F. Supp. 516 (D. Mass. 1974).

One decision, United States v. Dyson, 469 F. 2d 735 (5th Cir. 1972), involved a 22 month delay,

during which the defendant was available, between indictment and trial. The court found that 50 U.S.C. App. § 462(a) which directs that "[p]recedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing" had been violated. The government argues that this statute was not intended to afford a delinquent registrant a defense to an indictment for violating the Selective Service Act. The court in Dyson, however, noted that: "Draft refusers could expect to be brought to book quickly, but likewise they had the right to demand similar expedition of the awesome crimination sanction." Id. at 738.

We make no determination regarding the applicability of these statutes or decision to the twenty-six cases before us. We cite them merely as an example of the kind of considerations which may become significant once individual files are assessed.

V.

CLASS ACTION STATUS

Counsel's general motion to dismiss these indictments constitutes, in effect, a determination to handle these cases in a multi-party proceeding, similar to a class action. Although the equivalent of a class action might lie in a case such as this, see, e.g., United States ex rel. Lois Sero v. Preiser, Slip Op. 74-1944 at 266-70 (2d Cir. Nov. 6, 1974), the court has a degree of discretion in determining whether to review each case individually or to decide them as a group.

Thousands of similar indictments are pending across the country. At least two

other district courts are considering their validity, despite the fact that the defendants are fugitives. United States v. Kibbe, -- F. Supp. -- (D. Conn. 1974); United States v. McKinney, F. Supp. -- (E.D. Calif. 1974). At this time it would be inappropriate to treat these cases as a class for two reasons. First, further study of each individual case may bring to light new considerations, beyond the speedy trial claim, which may affect not only that indictment, but which may also be relevant to the entire group. Second, although some form of class action might be desirable, the stare decisis effect of an appellate court decision granting defense counsel's motion in an individual case would be the equivalent of a class action disposition, whereas a determination by a District Court would not have the same weight. Moreover, when an important constitutional issue is raised which may require Appellate and Supreme Court adjudications, it is particularly appropriate to develop individual records for the benefit of the reviewing court.

CONCLUSION

Defendants' motion is denied with leave to renew. In order to properly determine the validity of the charges brought against these defendants, the selective service files shall be made available to defense counsel. This will permit them to make motions in each case should they believe it appropriate to do so.

The court recognizes that such an examination of so many files places an onerous burden

upon counsel. If defense counsel desires aid, the court will entertain a motion to take appropriate ameliorative action.

So ordered.

Dated: Brooklyn, New York
November 26, 1974

/s/ Jack B. Weinstein
U.S.D.J.

APPENDIX F

Court of Appeals judgment, January 30, 1975

[Caption omitted]

A petition for a writ of mandamus and or prohibition having been filed and oral argument having been heard,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is granted.

A. Daniel Fusaro
Clerk

By Edward J. Guardaro
Senior Deputy Clerk

* * *

BEFORE: HON. IRVING R. KAUFMAN
Chief Judge

HON. WILFRED FEINBERG

HON. WALTER R. MANSFIELD

January 30, 1975

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577-505——75——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1170

THOMAS MARTIN AUSTIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 511 F. 2d 622. The September 30, 1974, opinion of the district court (Pet. App. C), is reported at 382 F. Supp. 1111. The district court's memoranda and orders of September 10, 1974, and November 21, 1974 (Pet. Apps. B and D) are not reported. The November 26, 1974, memorandum and order of the district court (Pet. App. E) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1975 (Pet. App. F). The petition for

a writ of certiorari was filed on March 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court exceeded its authority by appointing counsel to represent several fugitive defendants and by entertaining motions made ostensibly on their behalf by appointed counsel, when all such proceedings were conducted without the knowledge, consent, or participation of the defendants.

STATEMENT

1. The procedural history of this case is set forth in the opinion of the court of appeals (Pet. App. A 1–7). On September 10, 1974, the United States District Court for the Eastern District of New York Judge Weinstein entered an order *sua sponte* declaring that the defendants in 26 Selective Service criminal cases pending before it were allegedly fugitives without representation.[1] Taking judicial notice that

[1] For the purposes of the present petition only 19 cases are involved. One case has been terminated by reason of the defendant's death (*United States* v. *Lockwood*, Cr. 43456). The government has moved to dismiss two others, one because of the inadvertent destruction of the defendant's Selective Service file (*United States* v. *Wilson*, 69 Cr. 155), and the other because the defendant's induction order had been improperly accelerated on account of his failure to complete and return a form claiming conscientious objector classification (*United States* v. *Dewey*, 66 Cr. 456). In a fourth case (*United States* v. *Estremera*, 72 Cr. 1291), the defendant, upon being extradited to the United States on other charges, retained Jesse Berman, Esq., to represent him in lieu of the district court's initial appointment of Louis Lusky, Esq., and the government agreed to turn over his Selective Service file to Mr. Berman for review. After the opinion below was rendered, indictments

the President and Congress were then considering some form of amnesty for fugitives in such cases and concluding that the rights of these defendants might therefore be affected, the court, without prior notice to the government or the defendants, appointed Professor Louis Lusky of the Columbia University School of Law to represent these defendants (Pet. App. B).[2]

Upon learning of the order, the government advised the court on September 13, that, if the fugitive defendants should return to the United States, it would acquiesce in a delay of trial to permit disposition in accordance with any promulgations respecting amnesty and would agree to the release on personal recognizance of those defendants charged solely with Selective Service violations, but it also stated that it believed that the court had no authority to enter the order appointing Mr. Lusky. Upon the United States Attorney's motion to vacate the September 10 appointment of counsel, the court stayed the order pending a hearing on September 20.[3] Following that

against three other defendants (Alan Stephen Dorn, 69 Cr. 57; Thomas John Collura, 72 Cr. 1028; Arthur Marc Campus, 69 Cr. 182), were dismissed at the government's behest, because the Department inadvertently omitted their names from a compilation of those eligible for the President's clemency program submitted to Senator Edward Kennedy, Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure.

[2] That same day, September 10, 1974, the court issued a written memorandum and order to the same effect (Pet. App. B.).

[3] On September 16, the President's Amnesty Proclamation was issued.

hearing, the court filed a memorandum decision and order upholding its earlier *ex parte* order. On September 30, the court revised its opinion, stated at greater length its reasons for the appointment of counsel notwithstanding the defendants' absence from the jurisdiction as fugitives and their failure to authorize any such action to be undertaken on their behalf;[4] it again denied the government's motion to set aside its September 10 order (Pet. App. C; 382 F. Supp. 1111).

2. Thereafter, the court entertained motions made on behalf of the fugitive defendants by Mr. Lusky. Lusky moved to dismiss the indictments on the ground that the defendants had been denied a speedy trial in violation of their Sixth Amendment rights, even though trials had been rendered impossible by the defendants' flight from the jurisdiction. The government, in response to the motions, submitted affidavits attesting to the fugitive status of 23 of the defendants and the government's good faith efforts to locate and arrest them. Oral argument was heard on November 1, 1974. While apparently unable to find the indictments defective on their face, the court accepted

[4] The court stated that fugitive cases were artificially inflating the case load of both the court and the prosecutor and that, in order to guarantee "prompt disposition" of these cases, it would call each case to determine whether the government was making reasonable efforts to apprehend the fugitives, whether the public or the defendants were being prejudiced by the delay, and whether the indictments should be dismissed. It further stated that the President's Amnesty Proclamation might present an unfair choice to guiltless defendants, since they might accept the amnesty program rather than face trial (Pet. App. C2).

the suggestion of an *amicus curiae*, Michael Tigar, Esq., that Mr. Lusky be permitted to inspect the defendants' Selective Service files to determine whether motions might lie to dismiss the indictments on the basis of information appearing in the files. The informal order was stayed pending the filing of a brief by the government.[5]

On November 21, 1974, after having received and considered the government's brief, the court vacated the stay and ordered that the files be turned over to it so that it might makes copies available to Messrs. Lusky and Tigar (Pet. App. D). The government, while refusing to turn over the files for inspection by Messrs Lusky and Tigar, advised the court that it was willing to provide a copy of each defendant's file to the defendant or his authorized representative.[6] On November 26, 1974, the court issued a memorandum and order denying Mr. Lusky's earlier motions for dismissal of the indictments for lack of a speedy trial. However, the denial was without prejudice to a renewal of the motion after Mr. Lusky had examined the Selective Service files of the defendants (Pet. App. E).

The government then stated its intention to seek appellate review, and the court granted the government's request for a 14-day stay pending its filing

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[5] The government's brief again challenged the power of the district court so to proceed and further argued that only "a defendant" may obtain discovery of confidential documents pursuant to Rule 16(b) of the Fed. R. Crim. P.

[6] The government has supplied Messrs. Lusky and Tigar with the last known addresses of each of the defendants.

of a petition for a writ of mandamus and prohibition in the Second Circuit Court of Appeals seeking to vacate the orders entered by the court on November 1, 21, and 26, 1974.

3. On January 30, 1975, the court of appeals granted a writ of mandamus (Pet. App. A) and entered its judgment (Pet. App. F) requiring the district judge (1) to vacate his orders opening the Selective Service files of each of the fugitive defendants for inspection by Messrs. Lusky and Tigar without prior authority from the defedant whose file is sought, and (2) to cease entertaining motions on behalf of any of the fugtive defendants raising non-jurisdictional defenses to the indictments against such defendants, at least when no such defendant has authorized such action on his behalf.

ARGUMENT

1. At the outset we note that there is a substantial question whether Mr. Lusky has authority to file a petition on behalf of the named petitioners. Although Mr. Lusky may be an interested bystander, he has not been retained to file a petition by either Judge Weinstein[*] or the petitioners, nor does he have any

[*] Under Rule 21(b), Fed. R. App. P., which governs mandamus proceedings, if the judge named in the petition declines to appear, the petition is not taken as admitted because the Rule provides that "[a]ll parties below other than the petitioner shall also be deemed respondents for all purposes." Judge Weinstein did not appear in the court of appeals proceedings (Pet. 9), and although the court of appeals did not question Mr. Lusky's standing to speak on behalf of the judge in the mandamus action, it in effect concluded that there were

personal interest in the relief sought in the petition.[8]

In addition, entirely apart from the status of Mr. Lusky as, in effect, a stranger to any controversy

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no parties in the district court proceedings for whom Mr. Lusky was authorized to act. While procedural necessity may have dictated that Mr. Lusky's standing be assumed and an adversarial setting thereby preserved with respect to the *government's* petition for a writ of prohibition and mandamus, no such necessity exists regarding the invocation "on behalf" of *petitioners* of this Court's discretionary jurisdiction.

[8] The posture of this case is similar to that of *Rosenberg* v. *United States*, 346 U.S. 273, 291–292. In *Rosenberg*, the defendants were tried, convicted, and sentenced to death for conspiring to commit espionage in wartime, in violation of the Espionage Act of 1917, 50 U.S.C. 32(a), 34. After the adjournment of the 1952 Term and one Special Term, counsel representing one Edelman, who described himself as "next friend" to the Rosenbergs, presented to Mr. Justice Douglas a petition for habeas corpus which included a prayer for a stay. More than two months before this, Edelman's attorneys had asked counsel for the Rosenbergs to raise the very issue then presented to Mr. Justice Douglas. The argument was not adopted at that time by counsel for the defendants. Because Mr. Justice Douglas was of the opinion that Edelman's counsel posed a substantial question, he granted a stay of execution pending determination of the issue raised. In vacating the stay on grounds that the question was not substantial, this Court expressly disapproved the "irregular manner" in which the new contention was presented. *Id.* at 291. This Court, further noting that Edelman was a stranger to the Rosenbergs and to their case and that his intervention was unauthorized by them and originally opposed by their counsel, held that the precedent in the case of granting an unauthorized stranger standing to raise the question presented "a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases." *Id.* at 291–292. This Court then concluded: "That such disorderly intervention is more likely to prejudice than to help the representation of accused persons in highly publicized cases is self-evident. We discountenance this practice." *Id.* at 292. The in-

between the defendants and the government, the defendants (in whose name the petition was filed) are fugitives who are not entitled "to call upon the resources of the Court for determination of [their] claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366. See *Bonahan* v. *Nebraska*, 125 U.S. 692; *Smith* v. *United States*, 94 U.S. 97.

2. Even assuming that petitioners have properly invoked this Court's jurisdiction, the court of appeals, in an opinion on which we principally rely, correctly granted a writ of mandamus vacating the district court's orders.

The court of appeals considered all of the possible sources of judicial power upon which the district court might have predicated its orders and found no basis for the court's *sua sponte* appointment of counsel for fugitive defendants.* Thus, the court concluded (Pet. App. A 10–11):

> The absence of any statutory or inherent authority for district court action of the type

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tervention of unauthorized counsel in this case closely parallels that of the *Rosenberg* case; thus, to accord unauthorized counsel standing to litigate under the circumstances present here would appear to be at odds with this Court's express disapproval of such a procedure.

* Noting the district court's reliance on decisions upholding a court's power under Rule 12(b)(2), Fed. R. Crim. P., to dismiss an indictment appearing insufficient on its face and to dispense with the defendant's presence in hearing pretrial motions, the court of appeals observed (Pet. App. A 5–6) that such authorities did not support "the proposition that a trial court might, without a defendant's presence or consent, make an evidentiary disposition of a criminal case upon motion of an attorney acting without the defendant's knowledge or consent."

taken by respondent is not surprising. The challenged orders violate a fundamental premise underlying our method of administering justice. Ours is essentially an adversarial, not an inquisitorial, system. Whatever may be the judge's role in countries governed by a system of Civil Law, where the judge may by custom engage in investigative or prosecutorial activities, we have chosen to administer justice through courts which are limited to the adjudication of cases and controversies in an adversarial setting. See Art. III, U.S. Constitution; *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). With rare exceptions a federal court is not authorized to act *sua sponte;* an adversarial interest is essential. *Jenkins* v. *McKeithen*, 395 U.S. 411, 423 (1969). Although district judges possess the power to issue writs "in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U.S.C. § 1651, no usage or custom exists that permits a judge to appoint himself or a stranger as the representative of a defendant who has fled the jurisdiction in order to avoid facing criminal charges, at least without the fugitive's authority or consent. Indeed, controlling precedent is to the contrary. The flight of a defendant for the purpose of avoiding prosecution or punishment "disentitles [him] to call upon the resources of the Court for determination of his claims," *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *United States* v. *Sperling*, — F. 2d — (2d Cir. Oct. 10, 1974), Slip Opin. 5637,

5673 n. 33; *Dawkins* v. *Mitchell*, 437 F. 2d 646 (D.C. Cir. 1970); *People* v. *Genet*, 59 N.Y. 80 (1874).

3. Having properly ruled that the district court had no power to appoint counsel for the fugitive defendants, the court of appeals also correctly vacated the district court order granting Mr. Lusky and the *amicus* access to the defendants' Selective Service files. The court noted (Pet. App. A 9) that such files "are confidential in nature" (32 C.F.R. 1608.21) and therefore "should not be disclosed to persons other than the government officials concerned or to the defendant or his authorized representative." [10]

4. Since the district court exceeded its powers in appointing counsel for fugitive defendants and in entertaining motions made on their behalf, the court of appeals properly granted a writ of mandamus vacating those orders. See *United States* v. *Smith*, 331 U.S. 469; *Ex parte United States*, 242 U.S. 27; *United States* v. *Lasker*, 481 F. 2d 229 (C.A. 2), certiorari denied, 415 U.S. 975.

[10] Mr. Lusky's petition suggests that the question of access to these files is now moot by virtue of the 1974 amendments to the investigatory files exemption of the Freedom of Information Act. There is no occasion for this Court to consider that question, but we note that the rights of Mr. Lusky and the *amicus*, as members of the general public, to inspect the files do not rest solely on the investigatory files exemption. Rather, a request for inspection would also implicate exemption 6 of the Act, relating to an unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6), and the Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
SHIRLEY BACCUS-LOBEL,
ALAN J. SOBOL,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1170

THOMAS MARTIN AUSTIN, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

LOUIS LUSKY
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New York, New York 10027
Attorney for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1170

THOMAS MARTIN AUSTIN, et al., PETITIONERS

v.

UNITED STATES OF AMERICA, et al.

On petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

May it please the Court:

If the only reason for responding to the Government's brief in opposition were its erroneous statement (p.2) that the petition for certiorari was filed on March 17, 1975, this brief (authorized by Rule 24(4)) would not be submitted since the Government does not claim that the petition was filed too late. The petition was in fact filed on March 1, 1975, within thirty days after the court of appeals decision (docketing being delayed until after the Court had passed on petitioners' motion to proceed in forma pauperis).

There are, however, further reasons. The utterly remarkable positions taken by the Government, none of which is likely to command the assent of the Court, are interesting as showing the

poverty of the arguments against acceptance of jurisdiction. Not only does the Government, by its statement of the "Question Presented" (p.2) attempt to remake the case presented below -- ignoring the question of availability of Selective Service files (which prompted the Solicitor to authorize the application for appellate review after he had refused an earlier request of the eager young Assistant U.S. Attorney for authorization to seek review of the previous appointment of counsel). Not only does the Government omit mention of the parallel and virtually identical litigation now pending in the Ninth Circuit Court of Appeals (concerning which, more hereafter). The Government also takes the curious position that although petitioners would have had standing to oppose a certiorari petition -- if the court of appeals had denied all and not merely part of the relief sought by the Government -- but lack standing to file the present petition (footnote 7, pp. 6-7). Further, it evades the main legal issue (as did the court of appeals) by ignoring (pp. 8-10) the obvious source of district court jurisdiction to take the questioned actions -- the long-recognized power of any court to intervene sua sponte against abuse of its processes. And the Government carefully avoids taking issue with our petition in so far as we demonstrate the great public importance of the questions presented.

Even these things might not have led us to submit the present brief, since the Court is well able to perceive the hollowness of the opposition to certiorari. What does prompt us to speak, however, is that the brief in opposition, seen in its procedural context (of which the Court has not yet been fully informed) illustrates perfectly the soundness of our contention that the Government's basic effort is to maintain an executive monopoly over the one aspect of the criminal process in which the courts have thus far hesitated to review executive abuses -- the treatment of indicted persons who have not surrendered or been arrested.

For the Court to understand this fully, we must describe the procedural status of the Ninth Circuit case referred to above. (Upon request, we shall substantiate these facts by affidavit; but they are well known to the Government, and we doubt that they will be denied.) Judge Weinstein's appointment of counsel was by no means an isolated event. Perceiving the same dangers that led him to appoint counsel for the absent defendants, district judges in various parts of the country took similar action. One of those judges, Chief Judge Samuel P. King of the District of Hawaii, likewise took the further step which triggered the mandamus/prohibition application in the present case: he ordered the Government to open the defendants' Selective Service files for inspection by the court-appointed counsel. On January 8, 1975, shortly after petitioning the Second Circuit Court of Appeals for mandamus and prohibition in the present case, the Government filed a petition presenting exactly the same issues (and couched in almost the same language) to the Ninth Circuit Court of Appeals in an effort to frustrate the efforts of Judge King (United States v. Samuel P. King, District Judge, et al., C.A. 9 No. 75-1061). On January 22, 1975, the Ninth Circuit denied the petition without opinion. A true copy of the Court's order is attached hereto as Appendix A. The Solicitor General thereupon authorized application for certiorari in this Court.

Eight days later, on January 30, 1975, the Second Circuit Court of Appeals rendered its decision and opinion in the present case. Relying thereon, the Government petitioned the Ninth Circuit Court of Appeals for rehearing, which was granted; and the case has since been fully briefed and submitted on the merits but has not yet been decided.

We believe, reasonably, that the Government's tardiness in responding to our petition for certiorari resulted from its uncertainty as to how the

Ninth Circuit would rule. (Certainly there is nothing in the brief in opposition which would take 98 days to prepare -- from March 1 to June 6 -- which is nearly twice the generous 50-day period which the Government is allowed by Rule 24(1).) If the Ninth Circuit adhered to its original ruling, there would be a clear conflict of circuits which would call for review at the Government's instance in one case and at our instance in the other, and the Government might well refrain from opposing our petition. If, on the other hand, the Ninth Circuit followed the Second, the Government might well take a different course. Because we too wished this Court to know, when it passed on our certiorari petition, whether there was a conflict of circuits, we raised no objection to the delay and did not request the Clerk to distribute our petition to the Court immediately after April 20 as we had a right to do.

In this month of June, however, the Government appears to have perceived a way in which it might be able to have its cake and eat it too. This Court's summer recess was and is imminent, and June 19 is the last conference day this term for rulings on certiorari petitions, so we are advised by the Clerk. Accordingly the Government has abandoned its tactic of delay, and has proceeded to file its brief in opposition. Predictably, the Clerk thereupon distributed the papers to the Court immediately, on June 9, and the case has been scheduled for a ruling on June 19.

We do not criticize these procedural tactics, inconsistent as they might seem with the Solicitor General's traditional role as adviser to the Court rather than artful litigant. We do, however, point out that this course of action is best accounted for by the Government's strong desire to preserve the executive monopoly over the treatment of absent

defendants in criminal cases. By hook or by crook, the Government wants to win both of the pending cases without any increased danger of losing either, and thus maximize its chances of freezing off judicial intervention against executive abuses of the type feared by Judges Weinstein and King (among others) and described in our certiorari petition.

Other aspects of the brief in opposition corroborate the view that it is dominated by the Government's solicitude of the said executive monopoly. Its position that the present petitioners have standing to take an adversary position if the Government seeks appellate review, but not to seek appellate review themselves (footnote 7, pp. 6-7) is made from the whole cloth. It finds no support whatever in the provisions of the applicable rules (Fed. Rules App. Proc. 21(b) and this Court's Rule 21(4)), and can only be understood as a claim of special executive prerogative to deal with non-appearing defendants. The astonishing insistence that petitioners' attorney is a "stranger to the case" and the accompanying reliance on Rosenberg v. United States (footnote 8, p. 7) rest on the assumption that appointment of counsel by a district judge -- an officer appointed by the President, confirmed by the Senate, and bound by the same oath as the Justices of this Court -- does not take the appointed counsel out of the category of officious intermeddler.

This assumption is in effect a contention that the appointment of counsel was not only erroneous but absolutely void, despite the unquestioned power of federal courts to designate masters and amici curiae to assist them in the discharge of their judicial duties. See, e.g., Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 210(1968). Such an assumption suggests a most urgent need to foreclose judicial inquiry into the often slipshod work of executive personnel (including, but not limited to, Selective Service boards) which has so often merited this Court's

censure. The assumption implies a wholly unwarranted denial of the power of federal courts to prevent abuse of their processes.

In this connection we think we are bound to state, in view of the Government's unveiled accusation that an attorney appointed by the district court without a defendant's knowledge or prior approval is suspect as a mere interloper who will be free to disregard his client's interests, that the effect of the appointment is to subject the attorney to all the obligations of loyalty and industry which are imposed by the statutes and the canons of professional responsibility. And in view of the Government's emphasis on the absence of ratification by the defendants, we are bound to state that no single defendant whom counsel has succeeded in reaching has declined to ratify Judge Weinstein's appointment by sending in his written authorization. As the court of appeals opinion shows, two such authorizations had been received even before the oral argument in that court; and in the intervening months, additional authorizations have been received. Authorizations are now in hand from the defendants Collura, Friedman, Henry, Luerssen, Nolan, Powers, Salzmann, Sleeth, and Territo. There is no reason to doubt that, but for the Goverment's application for premature relief in the court of appeals, all or nearly all of the petitioners would have sent in such authorizations prior to action on their cases by the district court. What reason could they possibly have for refusing to do so?

Finally, we comment briefly on a few other points:

1. The Government's reliance on the Molinaro case, and other older cases likewise holding that this Court has power to adjudicate the cases of absent defendants but as a matter of judicial policy will ordinarily not exercise that power (p. 8) is misplaced. The Molinaro distinction

between power and judicial policy is meaningless unless it is understood to mean that each court's own sound discretion is to be determinative on the question whether it will entertain a claim on behalf of an absent defendant. It is one thing to hold that this Court will not decide Molinaro's case; it is quite another thing to say that an appellate court is justified in upsetting the district court's discretionary decision -- made in the very unusual context provided by the conditional amnesty program and the national reconciliation effort - to inquire into the validity of indictments of alleged Selective Service violators.

2. The Government makes no response whatever to Point II of the certiorari petition, which points out that the court of appeals has exceeded its own jurisdiction in entering the judgment below. It is fair to assume that the Government considers our Point II to be unanswerable.

3. The Government's response to our Point III is the wholly conclusory assertion (footnote 10, p. 10) that "[t]here is no occasion for this Court to consider" the effect of the recent amendments to the Freedom of Information Act, which became effective after entry of the court of appeals' judgment. Even a remand to the Court of Appeals for consideration of that question is evidently considered to be unthinkable -- but the Court is not told why.

The Government adds a wholly erroneous assertion that exemption 6 of the said Act, and the Privacy Act of 1974, provide an additional reason for insulating the Selective Service files from judicial scrutiny. As pointed out at page 27 of our petition for certiorari, the recent amendments make it clear that protection of personal privacy is to be afforded not by the withholding of entire files, but by the application for protective orders after in camera inspection by the district court. 5 U.S.C. §552(a)(4)(B); Clark, Holding

Government Accountable: The Amended Freedom of Information Act, 84 Yale L. J. 741, 753(1975). The Privacy Act of 1974 has no bearing. 5 U.S.C. §552a(b)(2).

4. Finally, the Government understandably refrains from saying a word to deny the extreme importance of the issues. Were it to do so, it might find itself embarrassed in seeking review of the Ninth Circuit's decision in United States v. King if that court adheres to its January 22 decision. The importance of the issues may therefore be taken as conceded.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

Louis Lusky
Attorney for petitioners

June 12, 1975

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

No. 75-1061

ORDER

UNITED STATES OF AMERICA

Petitioner,

U. S. DISTRICT COURT FOR HAWAII,

Respondent,

KURT BOYER, et al.,

Real Parties in Interest.

Before:

KOELSCH and WRIGHT, Circuit Judges.

On consideration of the petition for writ of mandamus filed herein on January 10, 1975, it is ORDERED that said Petition be and is DENIED.

FILED
January 22, 1975
Clerk
U. S. Court of Appeals

Mo. Cal. 1/20/75